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**RETHINKING THE PROTECTIVE PRINCIPLE OF
JURISDICTION AND ITS USE IN RESPONSE TO
INTERNATIONAL TERRORISM**

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Summary

This study examines the protective principle of extraterritorial criminal jurisdiction in international law and its use for combatting the threat of international terrorism. The study is, generally speaking, one of two parts.

The first part explores the rationale of protective jurisdiction and the interests that it serves, and assesses the importance of the rationale of this jurisdiction for combatting transnational crimes, including the problem of international terrorism. It also sheds important light on the modern historical development of protective jurisdiction and the various public and private efforts made to codify this ground of jurisdiction during the first half of the twentieth century.

The second part of the study provides original, empirical research into contemporary State practice, in an effort to examine whether, and, if so, to what extent, States have used protective jurisdiction for combatting the threat of international terrorism. It also enumerates, based on this practice, as well as the use of a range of other primary sources, including relevant treaty and U.N. Security Council practice, a list of vital interests that have been included under the ambit of protective jurisdiction *lex lata* and around which a basic level of agreement appears to have clustered. The study proposes that it may be possible to define protective jurisdiction in contemporary customary international law based on a 'shared vital State interests' approach. That is, the protection of certain vital interests is in conformity with the practice of the international community of States.

The study concludes that, in the light of the findings of State practice *inter alia* and the recent decision of the International Law Commission to include the topic of extraterritorial jurisdiction in its long-term programme of work, the codification of protective jurisdiction is necessary and desirable more than ever before. The most important advantages of the adoption of such an instrument are that it could be used as a persuasive source to guide States and courts in the adoption and interpretation of domestic laws; provide for the more effective protection of shared vital State interests by the international community; and complement the existing legal framework and 'fill in' gaps left by *ad hoc* sectoral treaties for combatting the increasingly complex, diffuse and evolving threat of international terrorism.

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I understand that it will be difficult, and perhaps even impossible, to repay these people for their generosity and the sacrifices that they have made. As a token of my appreciation, it is to Sarah and to my parents that this study is dedicated.

Declaration

I hereby declare that this is my own work and that it has not and will not be, in whole or in part, submitted by me to this or any other university for the conferment of any other degree.

Signature:

Table of Cases

Permanent Court of International Justice

Advisory Opinion Nationality Decrees in Tunis and Morocco, P.C.I.J. Reports 1923, Series B, No. 4

Case of the S.S. "Lotus" (France v Turkey), Judgment, P.C.I.J. Reports 1927, Series A, No. 10

Legal Status of Eastern Greenland (Denmark v Norway), Judgment, P.C.I.J. Reports 1933, Series A/B, No. 53

International Court of Justice

Anglo Norwegian Fisheries Case (U.K. v Norway), I.C.J. Reports 1951, p.116

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation), Preliminary Objections, I.C.J. Reports 2011, p.70

Application of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p.43

Armed Activities on the Territory of the Congo (DRC v Uganda), Judgment, I.C.J. Reports 2005, p.168

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, I.C.J. Reports 2002, p.3

Corfu Channel Case, (U.K. v Albania), Merits, Judgment, I.C.J. Reports 1949, p.4

Fisheries Jurisdiction Case (Federal Republic of Germany v Iceland), (Jurisdiction of the Court), I.C.J. Reports 1973, p.49

Fisheries Jurisdiction (U.K. v Iceland), (Jurisdiction of the Court) Judgment, I.C.J. Reports 1973, p.3

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p.136

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p.226

Military and Paramilitary Activities in and against Nicaragua, Merits, Judgment, I.C.J. Reports 1986, p.14

North Sea Continental Shelf Cases, Judgment, I.C.J. Reports 1969, p.3

Nottebohm Case (Liechtenstein v Guatemala), Judgment (second phase), I.C.J. Reports 1955, p.4

Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v U.K.), Provisional Measures, I.C.J. Reports 1992, p.3

Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v U.S.), Provisional Measures, I.C.J. Reports 1992, p.114

Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment, ICJ Reports 2012, p.32.

Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Belgium Memorial, vol. I (July 2010)

Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Application Instituting Proceedings, filed in the Registry of the Court on 19 February 2009, General List No. 144

Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Oral proceedings, Merits, 12 March 2012, CR 2012/2

Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Oral proceedings, Merits, 13 March 2012, CR 2012/3

Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Oral proceedings, Merits, 19 March 2012, CR 2012/6

U.S. Diplomatic and Consular Staff in Tehran (U.S. v Iran), Judgment, I.C.J. Reports 1980, p.3

Reports of International Arbitral Awards

Island of Palmas (Netherlands v U.S.), 4 April 1928, in Reports of International Arbitral Awards, vol.II, United Nations (2006)

Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals, 15 August 1893

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995)

Prosecutor v Furundzija, Case No. IT-95-17 (10 December 1998)

United Nations Committee against Torture

Suleymane Guengueng et al. v Senegal, Communication No.181/2001, decision of 17 May 2006, CAT/C/36/D/181/2001

Special Tribunal for Lebanon

Special Tribunal for Lebanon (Appeals Chamber), Interlocutory Decision on the Applicable Law, *Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/1 (16 February 2011)

European Court of Human Rights

Case of Barbar Ahmad and Others v The United Kingdom (Applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09), Judgment, 10 April 2012

Case of Aslakhanova and Others v Russia (Application Nos. 2944/06, 8300/07, 50184/07, 332/08, 42509/10), Judgment, Strasbourg, 29 April 2013

Case of Isayeva v Russia (Application No. 57950/00), Judgment, Strasbourg, 6 July 2005

Domestic courts

Ahmad and another v Government of the United States of America, [2006] EWHC 2927 (Admin)

Al-Fawwaz and others [2001] UKHL 69

Attorney-General v Mohamud Mohammed Hashi & 8 others [2012] eKLR

Attorney-General of the Government of Israel v Adolf Eichmann, 36 ILR 5 (District Court, 12 December 1961)

Attorney-General of the Government of Israel v Adolf Eichmann, 36 ILR 277 (Supreme Court, 29 May 1962)

Brief of Petitioner *Salim Ahmed Hamdan, Hamdan v U.S.*, No. 11-1257, 2011 WL 5569434, (D.C. Cir. 15 November 2011)

Cavallo Case, No. 14012002 (Mexico, Supreme Court, 10 June 2003)

Church v Hubbard, 2 Cranch, U.S. 187 (1804)

Emperor of Austria v Day & Kossuth (1861), 30 L.J.Ch. 690

Espionage Prosecution Case, 94 ILR 69

Filartiga v Pina-Irala, 630 F. 2d 876 (2nd Cir., 1980)

Flatlow v Islamic Republic of Iran, 999 F. Supp. 1 (D.C., 1998)

Fornage case (Cour de Cassation, 84 *J du Palais* 229, 1873)

Giles v Tumminello, 38 ILR 120

Gulf of Finland (Control Zone) Case, 8 ILR 406

Hamdan v Rumsfeld, 548 U.S. 557 (2006)

In re Extradition of Demjanjuk, 776 F.2d 571 (6th Cir., 1985)

Italian South Tyrol Terrorism Case (No 2), 71 ILR 243

Joyce v Director of Public Prosecutions [1946] A.C. 347

Le Louis (1817) 2 Dodson's Admiralty 210

Mustafa Kamel Mustafa (Otherwise Abu Hamza) v The Government of the United States of America for the Home Department, [2008] EWHC 1357 (Admin)

Polyukhovich v Commonwealth (1991) 101 ALR 545

Queen v Keyn [1876] 2 Ex.D. 63

R v Abu Hamza, [2006] EWCA Crim 2918

R v Jameson [1896] 2 Q.B. 425

R v Bow Street Magistrates' Court and others, ex parte Pinochet Ugarte [1998] All ER (D) 629 (No 1)

R v Bow Street Metropolitan Stipendiary Magistrate, Ex p. Pinochet Ugarte (No 3) [1999] 2 All ER 97

R v Zardad, High Court of 19 July 2005 (no written judgment is available)

Republic v Houssein Mohammed Osman & Ten Others, SCSC, Criminal Side No. 19 of 2011 (12 October 2011)

Rocha v U.S., 288 F. 2d 545 (9th Cir., 1961)

S v Okah (SS94/2011) [2013] ZAGPJHC 6 (21 January 2013)

Schooner Exchange v McFadden, 11 U.S. 116 (1812)

Shafiq Rasul, et al., v President of the U.S., et al. & Fawzi Khalid Abdullah Fahad al Odah, et al. v U.S., 542 U.S. 466 124 S.Ct 2686 159 L.Ed 2D 548 (2004)

U.S. ex rel. Majka v Palmer, 67 F. 2d 146 (7th Cir., 1933)

U.S. v Ahmed Abu Khatallah, 14-cr-00141 (D.C., 26 June 2014) (Indictment)

U.S. v Ahmed Abu Khatallah, 1:14-cr-00212 (D.C., 10 October 2014) (Indictment B)

U.S. v Ahmed Ibrahim al-Mughassil et al., Criminal No: 01-228-A (E.D. Va., June 2001) (Indictment)

U.S. v Arra, 630 F. 2d. 836 (1st Cir., 1980)

U.S. v Baker, 609 F.2d 134 (5th Cir., 1980)

U.S. v Babar Ahmad, (D. Conn., 6 October 2004) (Indictment)

U.S. v Benitez, 741 F. 2d 1312 (11th Cir., 1984), cert. denied, 471 U.S. 1137, 105 S.Ct. 2679 (1985)

U.S. v Bin Laden et al., S(9) 98 Cr. 1023 (LBS) (S.D.N.Y., 4 November 1998) (Indictment)

U.S. v Bin Laden, 92 F. Supp. 2d. 189 (S.D.N.Y., 13 March 2000)

U.S. v Bin Laden, 92 F. Supp. 2d 225 (S.D.N.Y., 15 March 2000)

U.S. v Bout, 12-1487-cr (2nd Cir., 2013)

U.S. v Cadena, 585 F. 2d 1252 (5th Cir., 1978)

U.S. v Cardales, 168 F. 3d 548 (1st Cir., 1999)

U.S. v al-Delaema, 1:05cr-00337 (D.C., 9 September 2005) (Indictment)

U.S. v Egan, 501 F. Supp. 1252 (S.D.N.Y., 1980)

U.S. v Felix-Gutierrez, 940 F. 2d1200 (9th Cir., 1991)

U.S. v Ghailani, S10 98 Crim. 1023 (LAK) (S.D.N.Y., 12 July 2010) (Indictment)

U.S. v Ghailani, 761 F. Supp. 2d 167 (S.D.N.Y., 21 January 2011)

U.S. v Gonzalez, 776 F. 2d 931 (11th Cir., 1985)

U.S. v Gonzalez, 311 F. 3d 440 (1st Cir., 2002)

U.S. v Hill, 279 F. 3d 731 (9th Cir., 2002)

U.S. v Hasan, 747 F. Supp. 2d 599 (E.D. Va. 2010)

U.S. v Ibrahim Suleiman Adnan Adam Harun, Cr. No. 12-134 (E.D.N.Y., 20 February 2012) (Indictment)

U.S. v Keller, 451 F. Supp. 631 (DPR, 1978)

U.S. v Khalid Sheikh Mohammed et al., (S14) 93 Cr.180 (KTD) (S.D.N.Y., 14 December 2009) (Indictment)

U.S. v Layton, 509 F. Supp. 212 (N.D. Cal., 1981)

U.S. v Manssor Arbabsiar and Ali Gholam Shakur, 11 MAG 2617 (S.D.N.Y., 11 October 2011)

U.S. v Mann, 615 F. 2d 668 (5th Cir., 1980)

U.S. v May May, 470 F. Supp. 384 (S.D. Texas, 1979)

U.S. v Mohammed, No. 06-357 (D.C., 23 January 2008)

U.S. v Mohammed, No. 06-357 (D.C., 15 May 2008)

U.S. v Mohammed, No. 09-3001 (D.C. Cir., 4 September 2012)

U.S. Mohammed Ali Al-Moayad, Mohammed Mohsen Zayad, (2nd Cir. 2008)

U.S. v Mustafa Kamel Mustafa et al., S2 04 Cr. 356 (JFK) (S.D.N.Y., 2006) (Indictment)

U.S. v Newball, 524 F. Supp. 715 (E.D.N.Y., 1981)

U.S. v Normandin, 378 F. Supp. 2d 4 (D.P.R., 2005)

U.S. v Perlaza, 439 F. 3d 1149 (9th Cir., 2006)

U.S. v Peterson, 812 F. 2d 486 (9th Cir., 1987)

U.S. Pizzarusso, 388 F. 2d 8 (2nd Cir., 1968)

U.S. v Reumayr, 530 F. Supp. 2d 1210 (D.N.M., 2008)

U.S. v Rezaq, 134 F. 3d 1121 (D.C., Cir., 1998)

U.S. v Ricardo, 619 F. 2d 1124 (5th Cir., 1980), *cert. denied*, 449 U.S. 1063, 101 S.Ct. 789, 66 L.Ed.2d 607

U.S. v Rodriguez, 182 F. Supp. 479 (S.D. Cal., 1960)

U.S. v Romero-Galue, 757 F. 2d 1147 (11th Cir., 1985)

U.S. v Shi, 525 F. 3d 709 (9th Cir., 2008)

U.S. v Suerte, 291 F. 3d 366 (5th Cir., 2002)

U.S. v Vasquez-Velasco, 15 F. 3d 833 (9th Cir., 1994)

U.S. v Wright-Barker, 784 F. 2d 161 (3rd Cir., 1986)

U.S. v Yousef, 327 F. 3d 56 (2nd Cir., 2003)

U.S. v Yunis, 681 F. Supp. 896 (D.C., 1988)

U.S. v Yunis, 924 F. 2d 1086 (D.C. Cir., 1991)

Military Commission

U.S. v Al Bahlul, 820 F. Supp. 2d 1141 (C.M.C.R. 2011) (en banc), *rev'd*, No. 11-1324 (D.C. Cir., 25 January 2013) (*per curiam*)

U.S. v Hamdan, 801 F. Supp. 2d 1247 (C.M.C.R. 24 June 24 2011)

U.S. Office of Military Commissions, MC Form 458, Charge Sheet (28 May 2008) [*Binyam Ahmed Mohamed*]

U.S. Office of Military Commissions, MC Form 458, Charge Sheet (18 June 2008) [*Ghailani*]

U.S. Office of Military Commissions, MC Form 458, Charge Sheet (31 May 2011) [KSM5]

U.S. Office of Military Commissions, MC Form 458, Charge Sheet (15 September 2011) [*Al-Nassir*]

U.S. Office of Military Commissions, MC Form 458, Charge Sheet (3 January 2012) [*Daqduq*]

Table of Treaties

International

1937 Convention on the Prevention and Punishment of Terrorism, 19 League of Nations O.J. 23 (1938), League of Nations Doc. C.546 (I).1937.V (1938)

Charter of the United Nations, San Francisco, 26 June 1945

Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, 78 U.N.T.S. 277

Geneva Conventions (I)-(IV), 12 August 1949

Convention on the High Seas, Geneva, 29 April 1958, 450 U.N.T.S. 11

Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, 500 U.N.T.S. 95

Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963, 704 U.N.T.S. 219

Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 U.N.T.S. 331

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971, 974 U.N.T.S. 177

Convention of the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973, 1035 U.N.T.S. 167

International Convention Against the Taking of Hostages, 17 December 1979, 1316 U.N.T.S. 205

U.N. Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 U.N.T.S. 3

U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, 1465 U.N.T.S. 85

The General Agreement on Tariffs and Trade, Geneva, July 1986

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988, 1678 U.N.T.S. 222

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 10 March 1988, 1678 U.N.T.S. 304

Convention on the Safety of United Nations and Associated Personnel, New York, 9 December 1994, 2051 U.N.T.S. 363

International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, 2149 U.N.T.S. 256

Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S. 3

International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, 2178 U.N.T.S. 197

International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2005, 2445 U.N.T.S. 89

Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, Beijing, 10 September 2010 (not yet in force)

Regional

1999 Organisation of African Unity Convention on the Prevention on Combating Terrorism

1999 Convention of the Organisation of the Islamic Conference on Combating International Terrorism

2005 Council of Europe Convention on the Prevention of Terrorism, ETS No.196

Table of General Assembly Resolutions

A/RES 174(II) (21 November 1947)

A/RES/175(II) (21 November 1947)

A/RES/178 (II) (21 November 1947)

A/RES/375 (IV) (6 December 1949)

A/RES/596 (VI) (7 December 1951)

A/RES/2131 (21 December 1965)

A/RES/2328 (XXII) (18 December 1967)

A/RES/2625 (XXV) (24 October 1970)

A/RES/3034/(XXVII) (18 December 1972)

A/RES/3314 (XXIX) (14 December 1974)

A/RES/40/61 (9 December 1985)

A/RES/42/22 (18 November 1987)

A/RES/49/60 (9 December 1994)

A/RES/51/210 (17 December 1996)

A/RES/56/83 (12 December 2001)

A/RES/ 61/34 (18 December 2006)

A/RES/60/288 (20 September 2006)

A/RES/63/568 (14 September 2009)

A/RES/64/252 (18 September 2009)

A/RES/64/117 (16 December 2009)

A/RES/64/117 (15 January 2010)

U.N. Doc. A/65/181 (29 July 2010)

A/RES/65/33 (6 December 2010)

Table of Security Council Resolutions

S/RES/457 (4 December 1979)

S/RES/731 (21 January 1992)

S/RES/748 (31 March 1992)

S/RES/883 (11 November 1993)

S/RES/1044 (10 January 1996)

S/RES/1189 (13 August 1998)

S/RES/1193 (28 August 1998)

S/RES/1214 (8 December 1998)

S/RES/1267 (15 October 1999)

S/RES/1269 (19 October 1999)

S/RES/1333 (19 December 2000)

S/RES/1368 (12 September 2001)

S/RES/1373 (28 September 2001)

S/RES/1377 (12 November 2001)

S/RES/1390 (28 January 2002)

S/RES/1440 (24 October 2002)

S/RES/1465 (13 February 2003)

S/RES/1456 (20 January 2003)

S/RES/1530 (11 March 2004)

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S/RES/1566 (8 October 2004)

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S/RES/1611 (7 July 2005)

S/RES/1617 (29 July 2005)

S/RES/1618 (4 August 2005)

S/RES/1624 (14 September 2005)

S/RES/1636 (31 October 2005)

S/RES/1664 (29 March 2006)

S/RES/1757 (30 May 2007)

S/RES/1805 (20 March 2008)

S/RES/1963 (23 December 2010)

S/RES/1976 (14 April 2011)

S/RES/1289 (17 June 2011)

S/RES/2083 (17 December 2012)

S/RES/2085 (20 December 2012)

S/RES/2133 (27 January 2014)

S/RES/2160 (17 June 2014)

S/RES/2161 (17 June 2014)

S/RES/2166 (21 July 2014)

S/RES/2169 (30 July 2014)

S/RES/2170 (15 August 2014)

S/RES/2178 (24 September 2014)

Table of Abbreviations

A.B.A.J.	American Bar Association Journal
AI	Amnesty International
AJIL	American Journal of International Law
ALI	American Law Institute
Am. U. Int'l L. Rev.	American University Law Review
Berkeley J. Int'l Law	Berkeley Journal of International Law
B. U. Int'l L. J.	Boston University International Law Journal
Brook. J. Int'l L.	Brooklyn Journal of International Law
BYIL	British Yearbook of International Law
Case W. Res. J. Int'l L.	Case Western Reserve Journal of International Law
CAT	United Nations Convention Against Torture
Chinese ILJ	Chinese Journal of International Law
CLF	Criminal Law Forum
CLP	Current Legal Problems
Colum. L. Rev.	Columbia Law Review
Cornell Int'l L. J.	Cornell International Law Journal
Cornell L. Q.	Cornell Law Quarterly
CTC	Counter-Terrorism Committee
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
ETS	European Treaty Series
Fordham Int'l L. J.	Fordham International Law Journal
Harv. Int'l L.J.	Harvard International Law Journal
HC	House of Commons
HRC	Human Rights Council
IBA	International Bar Association
ICC	International Criminal Court
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly
ICLR	International Criminal Law Review
ICRC	International Committee of the Red Cross
ILA	International Law Association
ILC	International Law Commission
ILCYB	International Law Commission Yearbook
ILQ	International Law Quarterly
IRRC	International Review of the Red Cross
Isr. L. Rev.	Israel Law Review
J. Comp. & Int'l L.	Journal of Comparative and International Law
J. Conflict Security Law	Journal of Conflict and Security Law
J. Crim. L. & Criminology	Journal of Criminal Law & Criminology
J. Hist. Int'l L.	Journal of History of International Law
J. Int'l L. & Int'l Rel.	Journal of International Law and International Relations
JICJ	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
LQR	Law Quarterly Review

Mich. L. Rev	Michigan Law Review
Minn. L. Rev.	Minnesota Law Review
MLR	Modern Law Review
New Eng. L. Rev.	New England Law Review
NoTIR	Nordic Journal of International Law
NYU	New York University
Pace L. Rev.	Pace Law Review
PCIJ	Permanent Court of International Justice
RIAA	Reports of International Arbitral Awards
SCSC	Supreme Court of Seychelles
Sixth Committee	Sixth Committee of the United Nations General Assembly
Stan. J. Int'l L.	Stanford Journal of International Law
STL	Special Tribunal for Lebanon
Texas ILJ	Texas International Law Journal
Tex. L. Rev.	Texas Law Review
Transnat'l L. & Pol'y	Transnational Law and Policy
U.N.	United Nations
UNODC	United Nations Office on Drugs and Crime
U.N.T.S.	United Nations Treaty Series
U.N.G.A.O.R	United Nations General Assembly Official Records
U. Ill. L. Rev.	University of Illinois Law Review
U. Pitt. L. Rev.	University of Pittsburgh Law Review
U.S.F. Maritime Law Journal	University of San Francisco School of Law Maritime Law Journal
Va. J. Int'l L.	Virginia Journal of International Law
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Yale J. Int'l L.	Yale Journal of International Law
Yale L. J.	Yale Law Journal

Chapter One

Introduction

1.1. Preliminary Remarks

International terrorism constitutes one of the most serious threats to the State and, according to the U.N. Security Council, to ‘international peace and security’. The transnational and increasingly complex and diffuse nature of the threat also poses a major challenge to the way in which States are able to combat it under international law. The focus of this study is on the protective principle of jurisdiction in international law, a ground upon which States are permitted to criminalise conduct by foreign nationals abroad deemed to threaten certain of their vital interests. It examines the use of this jurisdiction for combatting the threat of international terrorism. The study is, broadly speaking, one of two parts. The first part looks at the historical and modern development of, and theoretical justifications for, protective jurisdiction. Part two provides original empirical research into contemporary State practice in order to investigate whether, and, if so, to what extent, protective jurisdiction has been used in response to the problem of international terrorism. As will be explained, State practice evinces a strong trend as to the use of the principle in response to international terrorism, a trend that has been encouraged by relevant treaty practice and Security Council resolutions.

The study, having examined this State practice, enumerates some of the vital State interests, a core category of which are ‘shared’ by the international community, that have been included under the ambit of protective jurisdiction *lex lata*. It also proposes that it may be possible to define protective jurisdiction in contemporary customary international law based on what will be referred to as a ‘shared vital State interests’ approach, rather than a narrow list of crimes. That is, the protection of certain vital interests is in conformity with the practice of the international community of States. In that connection, a fundamental conceptual distinction is made between jurisdiction for protection of ‘shared vital State interests’ and ‘international community values’, in order to try and mark out more clearly protective jurisdiction from the theory of universal jurisdiction. Having identified the law *lex lata*, the study, by way of conclusion, assesses the codification of protective jurisdiction as a way forward. It

suggests that, in the light of the trend in State practice *inter alia* and the decision by the International Law Commission (ILC) to include the topic of ‘Extraterritorial jurisdiction’ in its long-term programme of work, the codification of protective jurisdiction is necessary and desirable. The most important advantages of such an instrument is that it could provide for the more effective protection of shared vital State interests by the international community and complement and ‘fill in’ gaps left by the existing *ad hoc* regime of counter-terrorism treaties.

The study uses a legal positivist methodology and a doctrinal method, both of which are explained below in further detail. The remainder of this introductory chapter will provide some preliminary explanations of jurisdiction in international law, generally, and of protective jurisdiction, more specifically. It also aims to contextualise the problem of international terrorism and explain the study’s central argument.

1.2. Protective Jurisdiction – An Overview

The protective principle of jurisdiction permits the State, as a matter of international law, to give extraterritorial effect to its national laws criminalising conduct committed wholly outside of its territory, when the conduct in question is deemed to pose a threat to or implicates its ‘vital interests’. The place where the conduct occurs, the nationality of the accused and any other link with the prescribing State are irrelevant to jurisdiction under the protective principle.¹ The protective principle, while contested in legal scholarship, occupies an important place in international law and international relations; indeed, it is the only accepted theory of extraterritorial jurisdiction that allows the State, during peace and in time of war, to protect itself and certain of its vital interests from the conduct of other State and non-State actors. A number of these vital interests appear to be shared by the international community, not least sovereignty, security, territorial integrity and political independence. The vital interest concept, then, is at the heart of protective jurisdiction, which provides for the principle’s rationale and forms the

¹ Cameron, I. (1994). ‘The Protective Principle of International Criminal Jurisdiction’. Aldershot: Dartmouth, at p.2; Blakesley, C.L., ‘Extraterritorial Jurisdiction’, in Bassiouni, M.C. (ed.) (2008). ‘International Criminal Law, II, Multilateral and Bilateral Enforcement Mechanisms’. The Netherlands: Martinus Nijhoff, at pp.108-109; Lowe, V. & Staker, C., ‘Jurisdiction’, in Evans, M.D. (2010). ‘International Law’. Oxford: OUP, at p.325; Ryngaert, C. (2008). ‘Jurisdiction in International Law’. Oxford: OUP, at p.96. Akande, D., “‘The Protective Principle’”; “‘The Active Nationality Principle’”; “‘The Passive Personality Principle’”; “‘The Territoriality Principle’”, in Cassese, A. *et al.* (eds.) (2009). ‘Oxford Companion to International Criminal Justice’. Oxford: OUP, at p.474.

essential nexus between the prescribing State and an offence committed outside its territory.² The protective principle falls within the general rules of jurisdiction in public international law and forms an aspect of international criminal law.³ Before explaining the reasons for studying protective jurisdiction, it is perhaps useful first to put the principle in context by explaining the meaning of ‘jurisdiction’ in international law and, thereafter, the various theories relating to grounds of jurisdiction.

1.3. Jurisdiction in International Law

‘Jurisdiction’ is a manifestation of State sovereignty and is governed by international law.⁴ One of the most important and fundamental aspects of international law’s role within the international community is to reconcile competing sovereign authorities and to prevent inter-State disputes.⁵ International law does that by delimiting jurisdiction and determining whether, and in what circumstances, States are permitted to regulate conduct in and outside their territory.⁶ Jurisdiction has two distinct aspects: prescriptive and enforcement.⁷ The decision of the Permanent Court of International Justice (PCIJ) in the *Lotus* case, the first and only occasion that an international court has discussed

² Cameron, *ibid.*, at p.31; Lowe & Staker, *ibid.*, at p.326; Shaw, M.N. (2008). ‘International Law’. Cambridge: CUP, at p.667.

³ Cameron, *ibid.*, at pp.3, 9-10.

⁴ Shaw, *supra* n 2, at p.645; *Case of the S.S. “Lotus” (France v Turkey)*, Judgment, PCIJ Reports 1927, Series A, No.10, at p.19; *Legal Status of Eastern Greenland (Denmark v Norway)*, Judgment, PCIJ Reports 1933, Series A/B, No.53, at p.48; Council of Europe, European Committee on Crime Problems, (1990), reprinted in (1991). ‘Extraterritorial Criminal Jurisdiction’. 3 *CLF* 441, at p.455; Greenwood, C., ‘State Jurisdiction’, U.N. Audiovisual Library of International Law, Lecture Series (2008); U.N. Doc.A/61/10 (2006), Annex E, at p.517 (ILC Secretariat); Bowett, D.W. (1982). ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’. 53 *BYIL* 1; Crawford, J. (2012). ‘Brownlie’s Principles of Public International Law’. Oxford: OUP, at p.456; Higgins, R. (1994). ‘Problems and Process: International Law and How We Use it’. Oxford: OUP, at p.56; Jennings, R.Y. (1962). ‘The Limits of State Jurisdiction’. 32 *NoTIR* 209; Mann, F.A. (1964). ‘The Doctrine of Jurisdiction in International Law’. 111 *Recueil des Cours* 1, at pp.9, 15-17; Simma, B. & Müller, A.T., ‘Exercise and Limits of Jurisdiction’, in Crawford, J. & Koskeniemi, M. (2012). ‘The Cambridge Companion to International Law’. Cambridge: CUP, at pp.135-136.

⁵ E.g., Council of Europe, *ibid.*; Mann, *ibid.*, at pp.10-11, 14-15; Simma & Müller, *ibid.*; *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, Judgment, I.C.J. Reports 2002, p.3, para.75 (J. Sep. Op. Judges Higgins *et al.*); Institute of International Law, ‘Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes’ (Rapporteur C. Tomuschat), Preparatory Work: Report-Replies and Observations of the Members of the Commission, 71 *Y.B.Inst.Int’lL.* 218 (2005); *Kiobel, at al. v Royal Dutch Petroleum, et al.*, U.S. Supreme Court, ‘Brief of Amicus Curiae of the European Commission in Support of Neither Party’, 13 June 2012.

⁶ *Lotus*, *supra* n 4, at p.19; *Advisory Opinion Nationality Decrees in Tunis and Morocco*, PCIJ Reports 1923, Series B, No.4, at pp.23-24; Mann, *ibid.*, at pp.11, 16.

⁷ *Lotus*, *ibid.*, at pp.18-19; Greenwood, *supra* n 4; ILC Secretariat, *supra* n 4, at p.517; Bowett, *supra* n 4, at p.1; Crawford, *supra* n 4, at pp.457, 478; Jennings, *supra* n 4, at pp.209, 212; Lowe & Staker, *supra* n 1, at pp.318, 335; Mann, *ibid.*, at pp.13-14 & chapter 4; Shaw, *supra* n 2, at pp.645-646; Simma & Müller, *ibid.*, at pp.136-137; Akehurst, M. (1972). ‘Jurisdiction in International Law’. 46 *BYIL* 145; O’Keefe, R. (2004). ‘Universal Jurisdiction: Clarifying the Basic Concept’. 2 *JICJ* 735, at pp.736-738.

jurisdiction in international law, may be regarded as the starting point for the consideration of the rules of international law governing the extraterritorial exercise of jurisdiction by a State.⁸ The PCIJ in that case stated *obiter* that: ‘the first and foremost restriction imposed by international law upon a State is that - failing the existence of a permissive rule to the contrary - it may not actually exercise its power in any form in the territory of another State.’⁹ A State is therefore prohibited by international law from enforcing its criminal law, by investigating, arresting, detaining, prosecuting, sentencing and punishing persons for acts criminalised, in the territory of another State without the latter’s consent.¹⁰

Jurisdiction to prescribe, sometimes called ‘legislative’ jurisdiction, refers to a State’s authority under international law to make its criminal law applicable over given conduct.¹¹ The protective principle is a form of jurisdiction to prescribe. International law places limits on the conduct over which a State may assert the applicability of its criminal law, by requiring that the extraterritorial application of national laws is grounded in one of a number of principles of prescriptive jurisdiction recognised by international law. These principles are thought to evidence a sufficiently close nexus between the impugned conduct and the interests of the prescribing State.¹² Specifically with reference to jurisdiction to prescribe, the PCIJ in the *Lotus* case was of the view that, while the territoriality of criminal law is a ‘fundamental’ principle of international law, it is equally true that nearly all States extend their criminal law to offences committed outside their territory ‘in ways which vary from State to State’.¹³ Due to the diversity of State practice, the PCIJ suggested that international law leaves to a State ‘a wide measure of discretion’ with respect to the exercise of jurisdiction outside its territory and that ‘every State remains free to adopt the [jurisdictional] principles which

⁸ *Lotus*, *ibid.* Cf. dissenting and separate opinions appended to the judgment in *Arrest Warrant*, *supra* n 5.

⁹ *Ibid.*, at p.18.

¹⁰ See also *Arrest Warrant*, *ibid.*, para.54 (J. Sep. Op. Judges Higgins *et al.*); *ibid.*, para.54 (Sep. Op. President Guillaume); *ibid.*, para.49 (Diss. Op. Judge Van Den Wyngaert); Greenwood, *supra* n 4; ILC Secretariat, *supra* n 4, at pp.519, 526; Akehurst, *supra* n 7, at pp.146-149; Bowett, *supra* n 4, at p.1; Lowe & Staker, *supra* n 1, at p.335; Shaw, *supra* n 2, at p.646; *Island of Palmas (Netherlands v U.S.)*, 4 April 1928, in RIAA, vol.II, U.N. (2006), at pp.829, 838; *Schooner Exchange v McFadden*, 11 U.S. 116 (1812).

¹¹ Greenwood, *ibid.*; ILC Secretariat, *ibid.*, at pp.517-518; Bowett, *supra* n 4, at p.1; Jennings, *supra* n 4, at p.212; Lowe & Staker, *supra* n 1, at pp.318-320; Mann, *supra* n 4, chapter 2; Shaw, *ibid.*, at pp.646, 649.

¹² Mann, *ibid.*, at p.19. Simma & Müller, *supra* n 4, at p.137.

¹³ *Lotus*, *supra* n 4, at p.20.

it regards as best and most suitable.’¹⁴ The PCIJ observed the ‘diversity of the principles’ of jurisdiction adopted by various States but it was not, however, prepared to discuss the more complex issue as to what these ‘principles’ might have been in existing State practice.¹⁵ Indeed, all that the PCIJ was prepared to say, in this regard, was that ‘all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction’.¹⁶ The limited analysis by the PCIJ *inter alia* should, perhaps, be of little surprise, given that this aspect of the judgment was merely *obiter*. Nonetheless, it follows that a State is prohibited from exercising jurisdiction outside its territory unless permitted by certain principles recognised by international law.¹⁷ It is therefore important to understand what these principles may be, given that they appear to evidence the permissible limits of international law and, in practice, are likely to determine whether assertions of prescriptive jurisdiction are tolerated, accepted or acquiesced.

In the absence of a treaty codifying jurisdiction, the principles that may be valid under contemporary customary international law and their scope and application have to be inferred from State practice. There have been a number of significant developments with respect to principles of extraterritorial jurisdiction since the *Lotus* case was decided which merit further discussion. As will be explained, the question has to be raised whether these principles have been defined satisfactorily. It is to these principles that the chapter will now turn.

1.4. Principles of Jurisdiction in International Law

While jurisdiction has developed in State practice over many centuries, it is certainly the case that theories or typologies of ‘grounds of jurisdiction’ have their origin in legal scholarship and are relatively recent in the history of modern international law. In one of the most important developments in the field of jurisdiction since the *Lotus* case was decided, the first systematisation of theories of jurisdiction occurred in 1935 by the ‘Research on International Law under the Auspices of the Harvard Law School’ (Harvard Research).¹⁸ The Harvard Research defined in its preparation of a ‘Draft

¹⁴ *Ibid.*, at p.19.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ See also Bowett, *supra* n 4, at p.3.

¹⁸ Research in International Law Under the Auspices of the Faculty of the Harvard Law School,

Convention on Jurisdiction with Respect to Crime’ (Draft Convention) five principles of jurisdiction to prescribe: (i) territoriality; (ii) nationality; (iii) protection; (iv) passive personality; and (v) universality. These jurisdictional principles were purportedly based on customary international law. It is useful, at this point, to briefly explain each of these theories of jurisdiction.

The territoriality of jurisdiction is based on the place where one of the constituent elements of an offence is initiated or consummated, and has long been regarded ‘as of primary importance and of fundamental character’.¹⁹ The theory of territoriality, as was pointed out by the PCIJ in the *Lotus* case, ‘is not an absolute principle of international law’.²⁰ The nationality principle permits a State to exercise extraterritorial jurisdiction over the conduct of its nationals, or domiciled residents, abroad, and, as with that of territoriality, is well established in international law.²¹ The protective, passive personality and universality theories of extraterritorial jurisdiction are subsidiary and are applicable over certain offences committed by foreign nationals abroad. The protective principle has already been alluded to above and is based on threats to the State and certain of its vital interests.²² The passive personality principle determines jurisdiction based on the nationality of the victim injured by an offence abroad. Notably, the validity of this principle in international law was dismissed by the Harvard Research and has traditionally been opposed in legal scholarship.²³ Nevertheless, in more recent years,

‘Jurisdiction with Respect to Crime’, 29 *AJIL* (*Spec. Supp.*) 435 (1935).

¹⁹ Harvard Research, *ibid.*, at p.445; also *Lotus*, *supra* n 4, at p.20; *Schooner Exchange*, *supra* n 10, at p.136; Akehurst, *supra* n 7, at p.152; Bowett, *supra* n 4, at p.4; Crawford, *supra* n 4, at p.458; Lowe & Staker, *supra* n 1, at p.320; Mann, *supra* n 4, at pp.24, 28, 84; Shaw, *supra* n 2, at p.652; Simma & Müller, *supra* n 4, at pp.137-141; Report of Mr. Bayard, Secretary of State, to the President, case of Antonio Pelletier, 10 January 1887, Foreign Relations of the U.S., 1887, at p.606; IBA, Legal Practice Division, ‘Report of the Task Force on Extraterritorial Jurisdiction’ (28 September 2008), at p.142 (Task Force).

²⁰ *Lotus*, *ibid.*

²¹ Harvard Research, *supra* n 18, at p.519; Akehurst, *supra* n 7, at p.156; Bowett, *supra* n 4, at p.7; Crawford, *supra* n 4, at p.459; Lowe & Staker, *supra* n 1, at p.323; Mann, *supra* n 4, at p.88; Shaw, *supra* n 2, at p.659; Simma & Müller, *supra* n 4, at pp.141-142; Task Force, *supra* n 19, at p.144.

²² See also *Arrest Warrant*, *supra* n 5, para.4 (Sep. Op. Judge Guillaume); *ibid.*, para.4 (Sep. Op. Judge Rezek); *Lotus*, *supra* n 4, at p.20; *ibid.*, at pp.35-36 (Diss. Op. Judge Loder); Greenwood, *supra* n 4; ILC Secretariat, *supra* n 4, at pp.522, 525; Akehurst, *ibid.*, at pp.157-158; Bowett, *supra* n 4, at p.10; Crawford, *supra* n 4, at p.462; Harvard Research, *ibid.*, at p.445; Simma & Müller, *supra* n 4, at pp.143-144; Task Force, *ibid.*, at p.149; *Attorney-General of the Government of Israel v Adolf Eichmann*, 36 ILR 5 (District Court, 12 December 1961), at pp.49-57; *Attorney-General of the Government of Israel v Adolf Eichmann*, 36 ILR 277 (Supreme Court, 29 May 1962), at p.304; *Church v Hubbard*, 2 Cranch, U.S. 187 (1804); Moore, J.B. (1887). ‘Report on Extraterritorial Crime and the Cutting Case’. Washington, D.C.: U.S. Department of State, Government Printing Office.

²³ Harvard Research, *ibid.*, at p.579; Mann, *supra* n 4, at pp.39, 91-92; ALI, Restatement (Second) of Foreign Relations Law of the U.S. (1965), para.30(2) (Second Restatement); Higgins, R., ‘The general

and particularly since the publication by the American Law Institute (ALI) of the Restatement (Third) in 1987, the use of extraterritorial jurisdiction over certain serious offences, mainly relating to acts of terrorism, committed against a State's nationals abroad has increasingly been described in judicial opinions and in legal scholarship as being based on a theory of passive personality.²⁴ The common element underlying these principles is evidence of a link between an offence committed abroad and the interests of the prescribing State. The purpose of this prescriptive nexus is to justify the regulation of the relevant conduct with regard to the sovereignty and internal affairs of other States and to minimise inter-State conflict.²⁵

The principle of universal jurisdiction, by contrast, does not require any such connection to the prescribing State. This arguably makes universal jurisdiction the most controversial theory defined by the Harvard Research. This theory is suggested by courts and in legal scholarship as being based solely on the 'heinous' nature of certain international crimes, the suppression of which is a concern of every State.²⁶ The theory is based on the premise that States act as 'agents of the international community' and have a sufficient interest to prosecute the perpetrators of such crimes to protect the 'values', sometimes also referred to as 'vital' or 'fundamental' interests, of the

international law of terrorism', in Higgins, R. & Flory, M. (eds.) (1997). 'Terrorism and International Law'. London: Routledge, at p.24.

²⁴ ALI, Restatement (Third) of Foreign Relations Law of the U.S. (1987), para.402 (Third Restatement); also *Arrest Warrant*, *supra* n 5, para.47 (J. Sep. Op. Judges Higgins *et al.*); Council of Europe, *supra* n 4, at p.450; Greenwood, *supra* n 4; ILC Secretariat, *supra* n 4, at pp.522, 524; Akande, *supra* n 1; Bowett, *supra* n 4, at p.10; Crawford, *supra* n 4, at p.461; Higgins, *supra* n 4, at pp.66, 68-69; Lowe & Staker, *supra* n 1, at p.330; Ryngaert, *supra* n 1, at p.94; Shaw, *supra* n 2, at pp.665-666; Simma & Müller, *supra* n 4, at p.143; Task Force, *supra* n 19, at pp.146-147; *U.S. v Yunis*, 681 F.Supp.896 (1988), at pp.896-902; *U.S. v Benítez*, 741 F.2d1312 (1984), cert. denied, 471 U.S. 1137, 105 S.Ct. 2679 (1985); Bates, S.E. (2011). 'Terrorism and International Law. Accountability, Remedies, and Reform. A Report of the IBA Task Force on Terrorism'. Oxford: OUP, at p.222; McCarthy, G. J. (1989). 'The Passive Personality Principle and Its Use in Combating International Terrorism'. 13 *Fordham Int'l L.J.* 298; Watson, G.R. (1993). 'The Passive Personality Principle'. 28 *Tex.Int'l L.J.* 1.

²⁵ Jennings, R. & Watts, A. (eds.) (1992). 'Oppenheim's International Law'. London: Longman, at pp.457-458.

²⁶ *Arrest Warrant*, *supra* n 5, at p.82 (J. Sep. Op. Judges Higgins *et al.*); *ibid.*, at p.167 (Diss. Op. Judge Van Den Wyngaert); Akehurst, *supra* n 7, at p.162; Bowett, *supra* n 4, at p.11; Harvard Research, *supra* n 18, at p.563; Jessberger, F., 'Universal Jurisdiction', in Cassese, *supra* n 1, at pp.155-157; Lowe & Staker, *supra* n 1, at p.326; Mann, *supra* n 4, at pp.39, 95; Ryngaert, *supra* n 1, at pp.101, 106-119; Shaw, *supra* n 2, at p.668; Simma & Müller, *supra* n 4, at p.144; Task Force, *supra* n 19, at p.150; AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction, Report, Council of the E.U. Doc.8671/09 (16 April 2009), Annex, para.8 (Expert Group); U.N. Doc.A/65/181 (2010), at p.4; Macedo, S. (ed.) (2001). 'The Princeton Principles on Universal Jurisdiction'. Princeton: New Jersey, at p.45; Scharf, M.P., 'Jurisdiction with Respect to Crime: Universal Jurisdiction and the Harvard Research', in Grant, J.P. & Barker, J.C. (eds.) (2007). 'Harvard Research in International Law: Contemporary Analysis and Appraisal'. Buffalo: William S. Hein & Co., Inc., at p.276.

international community.²⁷ The essence of universal jurisdiction, then, at the concept's most basic level, is the absence of what has been described variously as any 'normal', 'acceptable' and even 'lawful' prescriptive link between an alleged offence and the prosecuting State.²⁸

The Harvard Research was a 'private' effort to codify international law and the Draft Convention was proposed *lex ferenda*, and was not in fact adopted. Nonetheless, in the absence of a treaty codifying jurisdiction, it has subsequently had a profound influence on the way by which theories relating to grounds of jurisdiction in international law are defined and understood by States, courts and in legal scholarship.²⁹ What is more, the grounds of jurisdiction defined by the Harvard Research have increasingly been referred to and relied upon and treated as reflecting customary international law. In that regard, the influence of the Harvard Research is evident not only in State practice but also in other efforts, both public and private, to clarify or codify customary international law, for example, by the ILC, Council of Europe and the ALI, and in the adoption of numerous multilateral treaties.³⁰

It is important to make clear, from the outset, that misapprehension and divided opinion

²⁷ *Arrest Warrant*, *ibid.*, at pp.76, 79, 81 (J. Sep. Op. Judges Higgins *et al.*); *ibid.*, at p.141 (Diss. Op. Judge Van Den Wyngaert); *ibid.*, (Diss. Op. Judge Al-Khasawneh); *Eichmann* (Supreme Court), *supra* n 22, at p.300; Jessberger, *ibid.*; Mann, *ibid.*; Boister, N. (2003). 'Transnational Criminal Law?'. 14 *EJIL* 953, at p.964; Cassese, A. (2003). 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction'. 1 *JICJ* 589, at p.591; Cassese, A. (2005). 'International Law'. Oxford: OUP, at p.50; Institute of International Law (Rapporteur C. Tomuschat), 'Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes', Krakow, 2005, preambular paras.1-2 (Institute); Kreß, C. (2006). 'Universal Jurisdiction over International Crimes and the *Institut de Droit International*'. 4 *JICJ* 561, at pp.566, 569; Nagle, L.E. (2010)(a). 'Should Terrorism Be Subject to Universal Jurisdiction?'. 8 *Santa Clara J.Int'l L.* 87, at p.90; Nagel, L.E. (2010)(b). 'Terrorism and Universal Jurisdiction: Opening Pandora's Box'. 27 *GSUL Rev.* 339, at pp.342-343; Yee, S. (2011). 'Universal Jurisdiction: Concept, Logic, and Reality'. 10 *Chinese JIL* 503, at p.506.

²⁸ Yee, *ibid.*, at p.504; O'Keefe, *supra* n 7, at pp.740, 745; Meron, T. (1995). 'International Criminalisation of Internal Atrocities'. 89 *AJIL* 554, at p.568; O'Keefe, R. (2009). 'The Grave Breaches Regime and Universal Jurisdiction'. 7 *JICJ* 811, at p.814; Reydam, L. (2003). 'Universal Jurisdiction: International and Municipal Perspectives'. Oxford: OUP, at p.5; Williams, S. (2012). 'Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions'. 75 *MLR* 368.

²⁹ See Grant & Barker, *supra* n 26, at pp.20-29.

³⁰ E.g., Council of Europe, *supra* n 4; Expert Group, *supra* n 26, paras.8, 12; ILC Secretariat, *supra* n 4, at pp.520-526; Second Restatement, *supra* n 23; Task Force, *supra* n 19, chapter 3; Third Restatement, *supra* n 24; Council of Europe, Recommendation No. R (97) 11 of the Committee of Ministers to Member States on the Amended Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law, 12 June 1997, 'Part eight: jurisdiction of the state'; U.N. Doc.A/CN.4/596 (31 March 2008); ILC, 'Origin and background of the development and codification of international law', available online: www.legal.un.org/ilc/ilcintro.htm#_ftnref2; U.N. Doc.A/CN.4/13 and Corr.1-3 (12 April 1949), at pp.279-281; U.N. Doc.A/CN.4/661 (4 April 2013), para.40; U.N. Doc.A/CN.4/1/Rev.1 (1949), at pp.36-37. See also *Eichmann* (District Court), *supra* n 22; *Eichmann* (Supreme Court), *supra* n 22.

attends jurisdiction in international law. This is illustrated by D'Aspremont, who has argued that 'grounds of jurisdiction' provided by international law are, in fact, 'nothing but a construct of legal scholars'³¹ and that 'international law does not prescribe the use of any title to exercise jurisdiction' and therefore 'the legality of unilateral exercises of jurisdiction cannot, as a matter of principle, be questioned'.³² It would, perhaps, be an overstatement to say, as does D'Aspremont, that grounds of jurisdiction are 'nothing but a construct of legal scholars', given their assimilation in State practice. The suggestion made by D'Aspremont that grounds of jurisdiction are not a part of international law and, as such, may be freely asserted by States in any circumstance, unless it can be shown that it violates a prohibitive rule to the contrary, is one of the most frequently misquoted passages of the *Lotus* case.³³ Lowe and Staker have gone so far as to describe this interpretation of the *Lotus* case as a 'tiresome and oddly persistent fallacy'.³⁴ The argument made by D'Aspremont, if taken to its logical conclusion, would mean that international law has no relevance to jurisdiction; moreover, every State would be able to assert jurisdiction outside its territory, unilaterally and *prima facie* without any limitation, which does not appear to reflect State practice and the formation of customary international law, or the way in which jurisdiction has been codified in numerous multilateral treaties.³⁵

On closer inspection, the reason why D'Aspremont argued that grounds of jurisdiction are not a part of international law, it should be noted, is in order to justify the legality of

³¹ D'Aspremont, J. (2010). 'Multilateral versus Unilateral Exercises of Universal Jurisdiction'. 43 *Isr.L.Rev.* 301, at p.311.

³² *Ibid.*, at p.309; also *ibid.*, at p.311.

³³ E.g., *Arrest Warrant*, *supra* n 5, paras.45, 50-51 (J. Sep. Op. Judges Higgins *et al.*) (though *cf. ibid.*, paras.46, 57-58, 61); *ibid.*, paras.49-51 (Diss. Op. Van Den Wyngaert); Ryngaert, *supra* n 1, at pp.21-30, 116; Scharf, *supra* n 26, at pp.287-289; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p.226, para.21; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p. Pinochet Ugarte (No 3)* [1999] 2 All ER 97, at p.174 (Lord Millett); Inazumi, M. (2005). 'Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law'. Belgium: Intersertia, at p.58.

³⁴ Lowe & Staker, *supra* n 1, at p.318; also *Arrest Warrant*, *ibid.*, paras.4, 13-16 (Sep. Op. Judge Guillaume); *Nuclear Weapons*, *ibid.*, paras.12-15 (Dec. Judge Bedjaoui); *ibid.*, at pp.394-396 (Diss. Op. Judge Shahabuddeen); *Lotus*, *supra* n 4, at p.34 (Diss. Op. Judge Loder); *ibid.*, at pp.60-61 (Diss. Op. Judge Nyholm); Boister, *supra* n 27, at p.964; Cameron, *supra* n 1, at p.319; Harvard Research, *supra* n 18; Higgins, *supra* n 4, at pp.76-77; Mann, *supra* n 4, at pp.35, 83; Shaw, *supra* n 2, at p.656; Yee, *supra* n 27, at pp.524-527.

³⁵ These multilateral treaties are discussed in chapter five. See also Shaw, *supra* n 2, at p.656; *Nottebohm Case (Liechtenstein v Guatemala)*, Judgment (second phase), I.C.J. Reports 1955, p.4, at pp.20-24; *Anglo Norwegian Fisheries Case (U.K. v Norway)*, I.C.J. Reports 1951, p.116; *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p.3, para.74.

‘unilateral’ assertions of universal jurisdiction.³⁶ Interestingly, while D’Aspremont maintained that grounds of jurisdiction have no relevance to international law, as ‘international law does not organise and attribute jurisdiction’, at the same time, D’Aspremont argued that one particular ground of jurisdiction - the theory of universality - is different from all others in that it is a positive rule of international law.³⁷ Putting aside the development of jurisdiction in customary international law, to which D’Aspremont gives no consideration, the only way in which D’Aspremont is able to support the legality of universal jurisdiction in international law is to suggest that it has been codified in various treaties that use the obligation to extradite or prosecute.³⁸ As will be shown, however, there exists fundamental disagreement in the views of States, judicial opinion and in legal scholarship on the proper relationship between the theory of universal jurisdiction and the treaty obligation to extradite or prosecute. The argument made by D’Aspremont suggests that an alternative explanation to the confusion attending jurisdiction may be due to the way in which theories relating to grounds of jurisdiction were originally defined by the Harvard Research and subsequently adopted in legal scholarship.

1.5. Misinterpretation of Jurisdiction by the Harvard Research

The Harvard Research, as will be explained in greater detail in chapter three, appears to have confused and misinterpreted the theory of protective jurisdiction over piracy, which developed in State practice roughly between the seventeenth and nineteenth centuries for the protection of vital State interests that were ‘shared’ by the international community, or at least among the maritime powers, and called it by a different name, as universality.³⁹ The misinterpretation of principles of jurisdiction by the Harvard Research is not merely of historical significance and it has a number of important conceptual and practical implications. The acceptance of the Harvard Research has led to the widespread assumption by States, courts and in legal scholarship that, for hundreds of years, universal jurisdiction has applied to the crime of piracy and is

³⁶ See *supra* n 31.

³⁷ *Ibid.*, at p.311.

³⁸ *Ibid.*, at pp.305-306.

³⁹ Garrod, M. (2014). ‘Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law’. 25 *Diplomacy and Statecraft* 1; Rubin, A.P. (1997). ‘Ethics and Authority in International Law’. Cambridge: CUP, at p.24; Rubin, A.P. (1998). ‘The Law of Piracy’. U.S.: Transnational Publishers, Inc.; Reydams, L. (2010). ‘The Rise and Fall of Universal Jurisdiction’, *Leuven Centre for Global Governance Studies*, Working Paper No.37, at pp.10-13.

therefore well established as a permissive rule of customary international law.⁴⁰ It has also led to the suggestion by States, courts and in legal scholarship that, following the prosecution in the aftermath of World War II of thousands of alleged war criminals in Europe and the Far East, and the creation of International Military Tribunals at Nuremberg and Tokyo, the theory of universal jurisdiction over piracy has expanded to include other crimes under international law.⁴¹ An arguably more persuasive interpretation of State practice *inter alia*, and one that is adopted by the present study, is that jurisdiction was based on the protective principle, which developed out of the need by the ‘Allies’ to protect from persons belonging to the ‘enemy’ certain vital State interests ‘shared’ by the international community.⁴² Since the present author has published on the development of a customary rule of protective jurisdiction over piracy and war crimes elsewhere, based on the analysis of a wide range of primary sources, the present study will be confined to a summary of the findings.

The purpose of the present study is not to challenge the validity of the theory of universal jurisdiction in contemporary international law, which would require nothing less than a rigorous assessment of State practice and *opinio juris* and has already been

⁴⁰ E.g., *Arrest Warrant*, *supra* n 5, para.46; *ibid.*, at pp.79, 81 (J. Sep. Op. Judges Higgins *et al.*); *ibid.*, at pp.37-38 (Sep. Op. President Guillaume); *ibid.*, at p.55 (Dec. Judge Ranjeva); *ibid.* (Sep. Op. Judge Koroma); Akehurst, *supra* n 7, at p.160; Bowett, *supra* n 4, at pp.10-11; Cassese (2003), *supra* n 27, at p.591; Crawford, *supra* n 4 at p.468; Kreß, *supra* n 27, at pp.566, 569; Lowe & Staker, *supra* n 1, at p.326; Macedo, *supra* n 26, at pp.40, 45; Mann, *supra* n 4, at pp.39, 95; Ryngaert, *supra* n 1, at pp.108-109; Institute, *supra* n 27, para.2; Third Restatement, *supra* n 24, para.404; *Filartiga v Pina-Irala*, 630 F.2d876 (2nd Cir., 1980); *U.S. v Layton*, 509 F.Supp.212 (N.D. Cal., 1981); *In re Extradition of Demjanjuk*, 776 F.2d571; *U.S. v Yousef*, 327 F.3d56 (2nd Cir., 2003); Abi-Saab, G. (2003). ‘The Proper Role of Universal Jurisdiction’. 1 *JICJ* 596, at pp.599-600; Kontorovich, E. (2004). ‘Universal Jurisdiction and the Piracy Analogy’. 45 *Harvard Int’l L.J.* 183, at pp.184, 190; Randall, K. (1987-1988). ‘Universal Jurisdiction’. 66 *Tex.L.Rev.* 785, at p.793.

⁴¹ *Arrest Warrant*, *ibid.*, paras.61-63 (J. Sep. Op. Judges Higgins *et al.*); *Eichmann* (Supreme Court), *supra* n 22, at pp.293-300; *Pinochet*, *supra* n 33, at p.275 (Lord Millett); Akehurst, *ibid.*; Crawford, *ibid.*; Higgins, *supra* n 4, at p.61; Institute, *ibid.*, para.3(a); Kreß, *ibid.*, at pp.566, 568, 573-576; Lowe & Staker, *ibid.*; Randall, *ibid.*, at pp.802-810; Reydams, *supra* n 39, at p.34; Ryngaert, *ibid.*, at pp.110-115; Scharf, *supra* n 26, at pp.278-279; Shaw, *supra* n 2, at p.668; Third Restatement, *ibid.*, para.404; *Polyukhovich v Commonwealth* (1991) 101 ALR 545; *Prosecutor v Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), para.57; *Prosecutor v Furundzija*, Case No. IT-95-17 (10 December 1998), paras.147, 156; Benoit, J.P. (2006). ‘The Evolution of Universal Jurisdiction over War Crimes’. 53 *NLR* 259, at p.264; Broomhall, B. (2003). ‘International Justice and the International Criminal Court’. Oxford: OUP, at p.112; ILA, Committee on Human Rights Law and Practice, ‘Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences’, 69th Conference, 2000, at pp.3, 22; Joyner, C.C. (1996). ‘Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability’, 59 *Law and Contemporary Problems* 153, at pp.155-156, 166, 172; Morris, M.H. (2001). ‘Universal Jurisdiction in a Divided World: Conference Remarks’. 35 *NewEng.L.Rev.* 337, at pp.344-345.

⁴² Garrod, M. (2012). ‘The Development of Protective Principle Jurisdiction over War Crimes and the Hollow Concept of Universality’. 12 *ICLR* 763; Röling, B.V.A. (1960). ‘The Law of War and the National Jurisdiction since 1945’. 100 *Recueil des Cours* 323, at pp.355-377.

undertaken elsewhere.⁴³ Rather, the above discussion aims, more temperately, to shed light on the lessons that history can teach and to highlight that there has thus developed - to borrow a phrase from Robinson - an unproven 'collective belief' in respect of universality that has come to diverge dramatically from history.⁴⁴ It suffices to say that the cause of this collective belief is due to a persistent reliance on tentative, secondary sources, or the citation of a handful of primary sources, wholly out of context.⁴⁵ The consequence of this collective belief is that the nature of protective jurisdiction and its relationship with other theories of jurisdiction has tended to be confused. It has also led to the idea that the theory of universality is applicable over crimes under international law, while theories of extraterritorial jurisdiction other than universality are limited to crimes under domestic law. This 'jurisdictional dichotomy' over international and domestic crimes, as it will be referred to by the present study, has framed and shaped the current legal debate on the codification of jurisdiction in international law. Lastly, it has been suggested by a number of States, courts and in legal scholarship in recent years that the treaty obligation to extradite or prosecute, a provision first used in the grave breaches provisions of the 1949 Geneva Conventions and subsequently incorporated into more than 60 treaties, including treaties dealing with transnational crimes, for example, acts of terrorism, can be interpreted as the implied embodiment or codification of a theory of universal jurisdiction.⁴⁶

1.6. Reasons for Studying Protective Jurisdiction

A number of reasons justify the study of protective jurisdiction. First of all, the protective principle is a neglected area of international law and, as has already been

⁴³ Yee, *supra* n 27; Garrod, M., 'The Development of Universal Jurisdiction: A Plea for a More Rigorous Approach to International Law Making' (under preparation).

⁴⁴ Robinson, D. (2011). 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse'. 9 *JICJ* 355, at pp.378-379.

⁴⁵ Garrod, *supra* n 39, at p.5; Garrod, *supra* n 42, at pp.766, 796; Yee, *supra* n 27, at p.512.

⁴⁶ E.g., Council of Europe, *supra* n 4, at p.453; Expert Group, *supra* n 26, paras.9, 11; Akehurst, *supra* n 7, at pp.160-161; Cryer, R., 'Zardad', in Cassese, *supra* n 1, at p.979; D'Aspremont, *supra* n 31, at pp.305-306; Cassese (2003), *supra* n 27, at pp.591-592; Crawford, *supra* n 4, at p.471; Institute, *supra* n 27, para.2; Kreß, *supra* n 27, at pp.567-568; Macedo, *supra* n 26, at p.46; Mann, *supra* n 4, at p.95; O'Keefe, *supra* n 7, at pp.735, 747, 755; O'Keefe, *supra* n 28, at pp.811, 817, 826; Randall, *supra* n 40, at pp.817-819; Scharf, *supra* n 26, at pp.284-285; Simma & Müller, *supra* n 4, at p.145; Williams, *supra* n 28, at p.369; Third Restatement, *supra* n 24, para.404; U.N. Doc.A/65/181, *supra* n 26, paras.21-22; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, I.C.J. Reports 2012, p.32, para.74; U.N. Doc.A/66/93 (2011), paras.121-128; Cryer, R. & Friman, H. & Robinson, D. & Wilmshurst, E. (2010). 'An Introduction to International Criminal Law and Procedure'. Cambridge: CUP, at pp.51-53, 336.

pointed out elsewhere by Cameron, is only ‘dimly understood’.⁴⁷ The most comprehensive study of protective jurisdiction to date has been undertaken by Cameron, although this was limited to a comparative analysis of the principle’s supposed use in the domestic law of Sweden and the U.S.⁴⁸ Since the Harvard Research, little research of primary and secondary sources has been undertaken to critically assess protective jurisdiction.⁴⁹ Consequently, the principle has either been overlooked or defined in overly-narrow terms by courts and in legal scholarship, for example, as the protection of ‘narrow self-interest[s]’ of ‘security and credit’.⁵⁰ Other commentators have suggested that the principle is ‘rarely invoked’⁵¹ and that its validity is ‘uncertain and controversial’,⁵² or have described the principle as an ‘aggressive’ assertion of extraterritorial jurisdiction.⁵³

Since the Harvard Research, the nature of protective jurisdiction and its relationship with other grounds of jurisdiction, as discussed above, has been confused. The latter point was alluded to by the 1990 Report of the Council of Europe, which stated that ‘[t]here is sometimes no clear distinction between the principle of universality and other principles on which extraterritorial jurisdiction is based’, including the ‘principle of protection’.⁵⁴ The Report continued, moreover, ‘[t]here are often differences of opinion as to which principle should form the basis of a particular term of extraterritorial jurisdiction.’⁵⁵ More recently, the only way by which the 2009 ‘AU-EU Expert Report on the Principle of Universal Jurisdiction’ was able to distinguish the theory of

⁴⁷ Cameron, *supra* n 1, at p.24.

⁴⁸ *Ibid.*

⁴⁹ Cf. Task Force, *supra* n 19; Third Restatement, *supra* n 24 (it should be noted that the Restatement is of limited relevance for present purposes since it focuses primarily on U.S. practice).

⁵⁰ Reydam, *supra* n 28, at p.5. See also Expert Group, *supra* n 26, para.12; *Kiobel*, *supra* n 5, at p.4; Akande, *supra* n 1; Cryer *at al.*, *supra* n 46, at p.50; O’Keefe, *supra* n 7, at p.739; Ryngaert, *supra* n 1, at p.99; Scharf, *supra* n 26, at p.276; Shaw, *supra* n 2 at p.667; Simma & Müller, *supra* n 4, at p.143; Task Force, *ibid.*, at p.149; AI, ‘Universal Jurisdiction. A Preliminary Survey of Legislation Around the World’ (2011), at p.8; U.N. Doc.A/CN.4/5 (1949), at p.80; Chehtman, A. (2010). ‘The Philosophical Foundations of Extraterritorial Punishment’. Oxford: OUP, at p.70; Murphy, J.F. ‘Protected Persons and Diplomatic Facilities’, in Murphy, J.F. & Evans, A.E. (eds.) (1978). ‘Legal Aspects of International Terrorism’. D.C. Heath & Co.: Massachusetts, at p.284.

⁵¹ Kontorovich, *supra* n 40, at p.189.

⁵² Kontorovich, E. (2008). ‘The Inefficiency of Universal Jurisdiction’. 1 *U.Ill.L.Rev.* 390, at p.394; Kontorovich, *ibid.*; also Augenstein, D.H. & Boyle, A. & Singh Galeigh, N. (2010). ‘Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union’. Brussels: European Commission, note 55.

⁵³ Colangelo, A.J. (2007). ‘Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law’. 48 *Harv.Int’l.L.J.* 121.

⁵⁴ Council of Europe, *supra* n 4, at p.451.

⁵⁵ *Ibid.*

universality from that of protection was by defining the former as covering crimes that do not pose a ‘direct threat to the vital interests of the state asserting jurisdiction.’⁵⁶ Yet, this presupposes that protective principle jurisdiction is restricted to crimes posing a ‘direct threat’ to the prescribing State’s vital interests, an assumption for which there is no evidence in support.⁵⁷ It implies that States are able to assert universal jurisdiction over crimes that pose an indirect threat to their vital interests; this does not sit comfortably with the theory’s rationale. The protective principle has yet to be studied by the ILC, although the ILC’s Secretariat has commented that the principle ‘may be viewed as a specific application of the objective territoriality principle or the effects doctrine’.⁵⁸ The International Court of Justice (ICJ) in the *Arrest Warrant* was presented, for the first time since the *Lotus* case was decided, with the opportunity to examine extraterritorial jurisdiction but chose not to do so.⁵⁹ The Joint Separate Opinion of Judges Higgins, Kooijmans and Burgenthal appended to the judgment, *inter alia*, did not give any mention at all to protective jurisdiction, despite observing the ‘striking’ trend in recent years towards grounds of jurisdiction ‘other than territoriality’, and it appears to confuse the theory of protection with the theories of universality and passive personality.⁶⁰ The lack of understanding of protective jurisdiction and of conceptual clarity between grounds of jurisdiction may explain the suggestion in legal scholarship that grounds of jurisdiction interweave, and may be used in combination, with each another.⁶¹

A further reason for studying the principle is that the Harvard Research remains today the most comprehensive study on jurisdiction and there has been no subsequent treaty codifying grounds of jurisdiction. This may go some way to explaining, on the one hand, the reason why the Harvard Research has had such an extensive influence on

⁵⁶ Expert Group, *supra* n 26, para.8.

⁵⁷ See also Akehurst, *supra* n 7, at p.159; O’Keefe, *supra* n 7, at p.745; Kontorovich, *supra* n 40, at pp.189-190; Ryngaert, *supra* n 1, at pp.85, 100; Third Restatement, *supra* n 24, para.404.

⁵⁸ ILC Secretariat, *supra* n 4, para.13; U.N. Doc.A/CN.4/596, *supra* n 30, n 22; see also Kontorovich, *supra* n 40, at p.189; Third Restatement, *supra* n 24, para.404.

⁵⁹ *Arrest Warrant*, *supra* n 5, para.46.

⁶⁰ *Ibid.*, para.47 (J. Sep. Op. Judges Higgins *et al.*); see also *ibid.*, para.5 (Sep. Op. Judge Rezek); *ibid.*, para.4 (Sep. Op. Judge Guillaume); *Eichmann* (District Court), *supra* n 22, at pp.49-57; *Eichmann* (Supreme Court), *supra* n 22, at p.304; *Lotus*, *supra* n 4, at pp.55-58 (Diss. Op. Judge Finlay); *ibid.*, at pp.91-92 (Diss. Op. Judge Moore); chapters three & five.

⁶¹ Crawford, *supra* n 4, at p.477; *Eichmann* (District Court), *ibid.*, at pp.49-57; *Eichmann* (Supreme Court), *ibid.*, at p.304; Brownlie, I. (2008). ‘Principles of Public International Law’. Oxford: OUP, at p.308; *Kiobel, at al. v Royal Dutch Petroleum, et al.*, U.S. Supreme Court, ‘Supplemental Brief of Amici Curiae German Institute for Human Rights and International Law Experts in support of petitioners’, 13 June 2012, at p.7.

State practice and in legal scholarship and, on the other, why the misinterpretation of grounds of jurisdiction by the Harvard Research has not been assessed more critically or questioned. The fact that jurisdiction is left to State practice to regulate has meant that there is no accepted definition of protective jurisdiction, or of the category of ‘vital interests’ capable of falling under the principle’s ambit, in contemporary customary international law. An issue of great practical importance is that States and courts have no common, authoritative point of reference for grounds of jurisdiction in international law, or of their scope and application, when drafting and enacting or interpreting the extraterritorial application of national laws. The same point applies, *mutatis mutandis*, to the adoption by the ILC and the U.N. General Assembly of treaties that make provision for extraterritorial jurisdiction, and the adjudication of disputes by the ICJ. In practice, the way in which jurisdiction is interpreted *inter alia* is simply to point to one of the grounds of jurisdiction, as originally defined by the Harvard Research, that appears most convenient at the time and with little further analysis. The time is therefore opportune to provide a new analysis of protective principle jurisdiction and to assess whether or not the codification of this jurisdiction is necessary and desirable.

This is all the more pressing, given that extraterritorial jurisdiction has become one of the most important, and yet controversial, topics in contemporary international law, which is best illustrated, perhaps, by the vigorous debate in recent years by the General Assembly and its Sixth Committee on ‘[t]he scope and application of the principle of universal jurisdiction’;⁶² the decision by the ILC to include the topic of ‘Extraterritorial jurisdiction’ as part of its long-term programme of codification;⁶³ and the centrality of extraterritorial jurisdiction to other topics of international law currently under study by the ILC.⁶⁴ The way in which jurisdiction in international law, and its potential codification, has been framed, however, is fragmented: the General Assembly has limited its debate of extraterritorial jurisdiction to the theory of universal jurisdiction over crimes under international law, while the ILC has proposed to limit its study to theories of extraterritorial jurisdiction other than universality over domestic crimes.⁶⁵

⁶² U.N. Doc.A/63/237/Rev.1 (23 July 2009); A/RES/64/252 (18 September 2009); Sixth Committee, U.N. Doc.A/C.6/64/SR.12 (20 October 2009); *ibid.*, U.N. Doc.A/C.6/65/SR.10 (13 October 2010).

⁶³ ILC Secretariat, *supra* n 4.

⁶⁴ E.g., U.N. Doc.A/CN.4/596, *supra* n 30; U.N. Doc.A/59/10 (2004); U.N. Doc.A/60/10 (2005); U.N. Doc.A/CN.4/571 (7 June 2006).

⁶⁵ ILC Secretariat, *supra* n 4, paras.16, 35; U.N. Doc.A/63/237/Rev.1, *supra* n 62, U.N. Doc.A/65/181, *supra* n 26, para.28. See U.N. Doc.A/CN.4/603 (10 June 2008), paras.46-47; U.N. Doc.A/CN.4/612 (26

This has further entrenched the ‘jurisdictional dichotomy’ over international and domestic crimes.⁶⁶ Consequently, protective jurisdiction has been overlooked in terms of its development and applicability over crimes under international law. Assessment of the codification of protective jurisdiction is important for a further reason: the increasing importance of this jurisdiction for combating international terrorism, to which this chapter will now turn.

1.7. International Terrorism – Contextualising the Problem

The second part of this study examines the use of protective jurisdiction for combating the threat of international terrorism. It is useful, therefore, to explain briefly the nature of the problem. It has to be stressed, from the outset, that one of the most significant problems with ‘terrorism’ is the continued absence of a universal definition of the concept. Without such a definition, it is not possible to determine the nature and extent of the problem and there is, as yet, no fully coherent legal regime governing terrorism and responses to terrorism, not least because it allows the existence of many diverse, and often incompatible, national and regional definitions which cannot be harmonised with one another.⁶⁷ International terrorism is not a new phenomenon, with the first treaty being drafted by the League of Nations in 1937.⁶⁸ Nevertheless, the subjective and contentious nature of terrorism continues to prevent the General Assembly, and has done so since the 1970s, from completing negotiations on, and subsequently adopting, a Comprehensive Convention on International Terrorism, which is attributable, in particular, to the notion that one State’s ‘terrorists’ are another State’s ‘freedom fighters’; in that connection, fundamental disagreement exists regarding whether or not non-State actors engaged in armed self-determination and resistance to foreign occupation, as well as the conduct of a State’s organs - a concept known as ‘State terrorism’ - should fall within its scope.⁶⁹ It is also not uncommon for States to label

March 2009), para.33; U.N. Doc.A/CN.4/L.774 (24 June 2010), at pp.6-7; U.N. Doc.A/CN.4/L.829 (22 July 2013); Expert Group, *supra* n 26; Institute, *supra* n 27.

⁶⁶ This dichotomy appears to have its roots in the confusion between the protective and universal theories of jurisdiction by Judge Moore, which was subsequently adopted by the League of Nations and, thereafter, codified by the Harvard Research; see further chapter three.

⁶⁷ Samuel, H.L.K. & White, N.D. & De Friás, S.M. (eds.) (2012). ‘Report of Key Findings and Recommendations on the Rule of Law and Counter-Terrorism’. Multi-National Counter-Terrorism Expert Network, at pp.1, 12; also Hoffman, B. (2006). ‘Inside Terrorism’. Chichester: CUP, chapter 1.

⁶⁸ 1937 Convention on the Prevention and Punishment of Terrorism, 19 League of Nations O.J. 23 (1938), League of Nations Doc.C.546(I).1937.V (1938). See Saul, B. (2006). ‘The Legal Response of the League of Nations to Terrorism’. 4 *JICJ* 78.

⁶⁹ E.g., Hoffman, *supra* n 67, chapter 3; U.N. Doc.A/RES/3034/(XXVII) (18 December 1972); U.N.G.A.O.R., ‘Question of Palestine’, twenty-ninth session, U.N. Doc.A/PV.2282 and Corr.1 (13

their military and political opponents as ‘terrorist’, often interchangeably with the terms ‘subversives’, ‘mercenaries’, ‘armed bands’, ‘separatists’ and ‘militia’.⁷⁰ Rather, during the past fifty years, the General Assembly has responded to international terrorism by adopting counter-terrorism conventions sporadically and *ad hoc*; a response driven, it appears, over the specific concerns of some States, at particular points in time, by threats posed by non-State actors to certain of their vital interests. These treaties treat acts of terrorism simply as ordinary criminal offences.⁷¹ As will be shown, it is for the same reason that the Security Council has taken an increasing, albeit selective, role in the use of its powers under Chapter VII of the U.N. Charter, determining international terrorism as constituting a ‘threat to international peace and security’ and permitting States to define unilaterally acts and groups as ‘terrorist’, while at the same time obliging States to make provision in their national laws for extraterritorial jurisdiction over ‘terrorist acts’ and to extradite or prosecute alleged offenders found on their territory.⁷² International terrorism is, therefore, a crime defined, in various and often divergent ways, under domestic laws, rather than a crime under international law.⁷³

It has been widely suggested in legal scholarship that there has, since the 1990s, occurred a number of changes in the nature of international terrorism which, taken

November 1974); U.N. Doc.A/66/37 (2011), Annex I, paras.10, 18; U.N. Doc.A/68/37 (2013), Annex III, at pp.21-23; Sixth Committee, U.N. Doc.A/66/478 (15 November 2011), paras.23-26.

⁷⁰ E.g., Hoffman, *ibid.*, at p.23; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, I.C.J. Reports 2011, p.70, paras.51, 71, 86; *Case of Isayeva v Russia* (Application No. 57950/00), Judgment, Strasbourg, 6 July 2005; *Case of Aslakhanova and Others v Russia* (Application Nos. 2944/06, 8300/07, 50184/07, 332/08, 42509/10), Judgment, Strasbourg, 29 April 2013; HRC, Report of the independent international commission of inquiry on the Syrian Arab Republic, U.N. Doc.A/HRC/22/59, paras.16, 47 (5 February 2013); Policy Working Group on the U.N. and Terrorism, ‘Identical letters dated 1 August 2002 from the Secretary-General addressed to the President of the General Assembly and President of the Security Council’, U.N. Docs.A/57/273-S/2002/875 (6 August 2002), para.14; Law No. 19, The Counterterrorism Law, 2 July 2012 (Syria); Dalsh, A.A., ‘Saudi Arabia designates Muslim brotherhood terrorist group’, Reuters, 7 March 2014; International Commission of Jurists, ‘Assessing Damage, Urging Action’, Report of its Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, Geneva, at p.29; Leonard, E. (2010). ‘The Lord’s Resistance Army: an African Terrorist Group?’. 4 *Perspectives on Terrorism* 20; Smith, M.A., ‘The Second Chechen War: Foreign Relations and Russian Counter-Reaction’, in Aldis, A.C. (ed.) (2000). ‘The Second Chechen War’, Conflict Studies Research Centre, United Kingdom, Department of Defence.

⁷¹ See also Guillaume, G. (2004). ‘Terrorism and International Law’. 54 *ICLQ* 537.

⁷² E.g., S/RES/731 (21 January 1992), preambular para.2; S/RES/748 (31 March 1992), preambular paras.4 & 7; S/RES/883 (11 November 1993), preambular paras.5-6; S/RES/1333 (19 December 2000), preambular para.7; S/RES/1368 (12 September 2001), preambular para.2 & operative para.1; S/RES/1373 (28 September 2001), preambular paras.3 & 5.

⁷³ Saul, B. (2006). ‘Defining Terrorism in International Law’. Oxford: OUP, at pp.262-270.

together, represent the emergence of a 'new terrorism'.⁷⁴ The 'new terrorism' is said to differ from more traditional forms of international terrorism in three main ways. First of all, in contrast to the more traditional, formalised terrorist organisations, which usually have an identifiable structure and hierarchy and operate within a particular territory or a well defined geographical area, the structure of new terrorist groups is comprised of amorphous and diffuse networks made up of autonomous individuals and cells that are loosely tied to each other, with no apparent hierarchy. These cells are transnational in nature and operate across national territorial boundaries in order to inter-link international networks.⁷⁵ Al-Qaeda networks, for example, are estimated to operate in over 60 countries, making it the most widely dispersed non-State terrorist network in history.⁷⁶ The U.S. Supreme Court has described al-Qaeda as a 'new' and 'amorphous' enemy that poses new threats to national security.⁷⁷ A number of other groups, which the Security Council has designated as 'terrorist' and suggested to be 'associated' with al-Qaeda, namely Al-Qaida in the Islamic Maghreb, Al-Qaeda in the Arabian Peninsula, Al-Shabab, Al Nusrah Front (ANF) and the Islamic State in Iraq and the Levant (ISIL), are also reported to operate in numerous countries.⁷⁸ The Security Council has expressed its 'gravest concern' over the 'large-scale offensive' and 'control of territory in parts of Iraq and Syria' by the ISIL and ANF and 'concern' over the scale of the flow of foreign terrorist fighters from more than 80 countries to assist them, which threatens the sovereignty, security, territorial integrity, independence, diplomatic personnel and premises, government officials and nationals of Iraq and Syria and of other States.⁷⁹ The recent advances of ISIL in Iraq illustrate not only the complex, transnational nature of international terrorism but also the relative power of terrorist groups to that of States. Of

⁷⁴ See Neumann, P. (2009). 'Old and New Terrorism'. Cambridge: Polity Press; Ganor, B. 'Terrorism in the Post-Cold War Era', in Centre of Excellence Defence Against Terrorism, 2006, 'Global Terrorism and International Cooperation', Ankara: The Turkish General Staff Printing House, at p.21; Lippman, M. (2002-2003). 'The New Terrorism and International Law'. 10 *Tulsa.J.Comp.&Int'lL.* 297; Wilkinson, P. (2005). 'International terrorism: the changing threat and the EU's response', Institute for Security Studies, Chaillot Paper No.84, at p.13; Hoffmann, B. (2002). 'Rethinking Terrorism and Counterterrorism Since 9/11'. 25 *Studies in Conflict and Terrorism* 303.

⁷⁵ U.N. Docs.A/57/273-S/2002/875, *supra* n 70, para.12; Report of the High-level Panel on Threats, Challenges and Change', U.N. Doc. A/59/565 (2004), at p.47; Council Framework Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330 of 9 December 2008, p.21, paras.3-4.

⁷⁶ Wilkinson, *supra* n 74, at p.13.

⁷⁷ *Shafiq Rasul, et al., v President of the U.S., et al. & Fawzi Khalid Abdullah Fahad al Odah, et al. v U.S.*, 542 U.S. 466 124 S.Ct 2686 159 L.Ed 2D 548 (2004).

⁷⁸ E.g., U.N. Doc.A/HRC/22/59, *supra* n 70, para.15; S/RES/2085 (20 December 2012), para.2; Forest, J.J.F. (2011). 'Al-Qaeda's Influence in Sub-Saharan Africa: Myths, Realities and Possibilities'. 5 *Perspectives on Terrorism* 63; Mapping Militant Organisations, Stanford University, available online: www.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/61#attacks.

⁷⁹ S/RES/2169 (30 July 2014), preambular para.4. See further chapter six.

particular importance to the transnational nature of terrorist acts, which has to date been given little consideration, is ‘cyber-terrorism’ and the ‘use of the Internet for terrorist purposes’.⁸⁰ A further aspect to this problem is the contemporary phenomenon known as ‘State-sponsored’ terrorism, that is, the active and often clandestine support, encouragement and assistance provided by a government to a terrorist group and while, at the same time, falling outside the international rules on State responsibility.⁸¹

Secondly, terrorist networks are based increasingly on religious motivations and ideologies, rather than the pursuit of national aims. Finally, the methods of irregular warfare and the lethality of violence used by new terrorist groups are heretofore unknown. It has to be understood that al-Qaeda is only one of many different Islamic terrorist groups, specifically, some of which are sympathetic to al-Qaeda but no more than loosely and indirectly linked to it, and of terrorist groups more generally, which have vastly differing political, ideological, religious and economic causes.⁸² That said, al-Qaeda is, perhaps, a notable manifestation of the ‘new terrorism’, not least because the attacks on the U.S. in 2001 led to an unprecedented legislative response by the Security Council and also because, other than the Taliban, al-Qaeda is the only group - and, more recently, individuals and entities ‘associated with it’ - which the Council has agreed to designate as ‘terrorist’.⁸³

Two further points, which are of importance to the present study, are worthy of note: first, whether or not one accepts the emergence of a ‘new terrorism’, one of the broad characteristics of international terrorism is that the State and its nationals tend to be the target, and acts of terrorism not only violate human rights but are also deemed to threaten or implicate, directly and indirectly, certain shared vital State interests. Some of

⁸⁰ Council Framework Decision 2008/919/JHA, *supra* n 75; U.N. Office on Drugs and Crime, ‘The use of the Internet for terrorist purposes’, 22 October 2012 (UNODC), available online: www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf.

⁸¹ Hoffman, *supra* n 67, at p.14; Becker, T. (2006). ‘Terrorism and the State: Rethinking the Rules of State Responsibility’. Oxford: Hart.

⁸² Wilkinson, *supra* n 74, at p.12; Braniff, B. & Moghadam, A. (2012). ‘Towards Global Jihadism: Al-Qaeda’s Strategic, Ideological and Structural Adaptations since 9/11’. 5 *Perspectives on Terrorism* 36; Piazza, J. (2009). ‘Islamist Terrorism More Dangerous?: An Empirical Study of Group Ideology, Organisation, and Global Structure’. 21 *Terrorism and Political Violence* 62; Ploch, L. (2010). ‘Countering Terrorism in East Africa: The U.S. Response’. Congressional Research Service; Sageman, M. (2009). ‘Confronting al-Qaeda: Understanding the Threat in Afghanistan’. 3 *Perspectives on Terrorism* 4.

⁸³ S/RES/1267 (15 October 1999); S/RES/1289 (17 June 2011); S/RES/2083 (17 December 2012); S/RES/2085 (20 December 2012), para.2.

these interests are illustrated by recent incidents and include, for example, the State's sovereignty, political independence, territorial integrity, national security, diplomatic personnel and embassies and military personnel, installations and property. That said, the actual nature and scale of the threat remains insufficiently clear. One of the main reasons for this is due to the lack of a legal definition of 'terrorism', discussed above, which means that the threat of terrorism is relative and can differ considerably, depending on the State against which terrorist groups are fighting. A separate but related matter is the scarcity of primary source-based research and the absence of an independent, U.N. monitoring mechanism that records alleged incidents and prosecutions.⁸⁴ Nevertheless, in spite of the sizeable and growing body of scholarly literature on the subject of international terrorism, it is rather surprising that the threat to shared vital State interests has been given little consideration, even though, as will be shown, it has partly shaped the behaviour of States, as it has taken shape through the agreement of numerous counter-terrorism conventions and the adoption of resolutions by the General Assembly and Security Council, as well as the enactment of specific domestic laws.

Secondly, the transnational nature of terrorist networks poses a serious challenge to the adequacy of the traditional grounds of territoriality and nationality jurisdiction in international law. The complex and evolving nature of the threat also means that it is *ipso facto* incapable of being encompassed wholly within the jurisdictional regime provided for by sectoral treaties. On a separate but closely related matter, the transnational nature of the threat posed to certain vital State interests, and the prohibition, without consent, of enforcing jurisdiction in the territory of foreign States, has led some States to seek to justify the use of military force and targeted killing of non-State terrorist actors under Article 51 of the U.N. Charter and the laws of war.⁸⁵

⁸⁴ See also Schuurman, B. & Eijkman, Q., 'Moving Terrorism Research Forward: The Crucial Role of Primary Sources', Background Note, June 2013, International Centre for Counter-Terrorism, The Hague. Cf. UNDOC, Counter-Terrorism Database, available online: www.unodc.org/tldb/; RAND, Database of Worldwide Terrorism Incidents, A RAND National Defence Research Institute Research Project, available online: www.rand.org/nsrd/projects/terrorism-incidents.html; Global Terrorism Database (GTD) maintained by the University of Maryland, available online: www.start.umd.edu/gtd/; START Global Terrorism Database, available online: www.start.umd.edu/start/.

⁸⁵ E.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p.136; *Armed Activities on the Territory of the Congo*, Judgment, I.C.J. Reports 2005, p.168; Alston, P., Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 'Study on targeted killings', HRC, U.N. Doc.A/HRC/14/24/Add.6 (2010); Speech by Harold

The problem of establishing jurisdiction over terrorist acts outside the State's territory has been little discussed in legal scholarship, with existing works being either insufficiently comprehensive and/or largely out of date.⁸⁶ Assessment of the use of protective jurisdiction for combating the threat is all the more important, given that the existing response by the international community has predominantly been under a criminal law paradigm, and protective jurisdiction has been included in numerous counter-terrorism conventions and been at the heart of important cases for the prosecution of terrorist acts abroad.⁸⁷

Limiting discussion to protective jurisdiction, which is only one potential aspect of an otherwise multifaceted approach to combating international terrorism, necessarily involves the exclusion of a number of other important issues. Firstly, the study is not concerned with examining 'terrorism' *per se*, or the definition or typologies of 'terrorism', or the 'root causes' of 'terrorism', which have already been discussed elsewhere.⁸⁸ Secondly, it does not examine the lawfulness, as a matter of international

Hongju Koh, Legal Adviser, U.S. Department of State, Annual Meeting of the American Society of International Law, Washington, D.C., 25 March 2010; Christakis, T. & Bannelier, K., 'French Military Intervention in Mali: Its' Legal but ... Why? Part I', 24 January 2013, EJIL: Talk!; Dorsey, J. & Paulussen, C., 'The Boundaries of the Battlefield: A Critical Look at the Legal Paradigms and Rules in Countering Terrorism', Research Paper, April 2013, International Centre for Counter-Terrorism, The Hague; Kretzmer, D. 'Use of Lethal Force Against Suspected Terrorists', in Samuel, L.H.K. & White, D.N. & Salinas de Friás, M. A. (eds.) (2012). 'Counter-Terrorism International Law and Practice'. Oxford: OUP, chapter 24; Pejic, J. 'Armed Conflict and Terrorism: There is a (Big) Difference', *ibid.*, chapter 7; Rogers, V.P.A. & McGoldrick, D. (2011). 'Assassination and Targeted Killing—The Killing of Osama Bin Laden'. 60 *ICLQ* 778; Tams, C.J. (2009). 'The Use of Force against Terrorists'. 20 *EJIL* 359; Trapp, N.K. (2010). 'The Use of Force Against Terrorists: A Reply to Christian J. Tams'. 20 *EJIL* 1049.

⁸⁶ E.g., Blakesley, *supra* n 1; Adler, S.J. (2006). 'Fighting Terrorism in a New Age: A Call for Extraterritorial Jurisdiction over Terrorists'. 18 *U.S.F.MaritimeLawJournal* 164; Blakesley, C.L. (1987). 'Jurisdiction as Legal Protection Against Terrorism'. 19 *Conn.L.Rev.* 895, at pp.908-909; Gaynes, J.B. (1978). 'Bringing the Terrorist to Justice: A Domestic Law Approach'. 11 *CornellInt'lL.J.* 71; Maogoto, J.N. (2005). 'Battling Terrorism. Legal Perspectives on the Use of Force and the War on Terror'. Aldershot: Ashgate, at p.63; Paust, J.J. (1983). 'Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine'. 23 *Va.J.Int'l.L.* 191, at p.210.

⁸⁷ E.g., *U.S. v Bin Laden*, 92 F. Supp. 2d. 189 (S.D.N.Y., 13 March 2000); *U.S. v Reumayr*, 530 F.Supp.2d1210 (D.N.M., 2008), at pp.1216, 1219; *U.S. v Ghailani*, 761 F.Supp.2d167 (S.D.N.Y., 21 January 2011); *Al-Fawwaz and others* [2001] UKHL 69, para.52 (Lord Slynn); *ibid.*, para.64 (Lord Hutton); *ibid.*, paras.101-107 (Lord Millett); *ibid.*, para.117 (Lord Scott); *ibid.*, paras.136-146 (Lord Rodger); Special Tribunal for Lebanon (Appeals Chamber), Interlocutory Decision on the Applicable Law, *Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/1, 16 February 2011.

⁸⁸ See Saul, *supra* n 73; Wilkinson, *supra* n 74, at pp.14, 47-48; Schmid, A.P. (2004). 'Frameworks for Conceptualising Terrorism'. 16 *Terrorism and Political Violence* 197; Schmid, A.P. (ed.) (2011). 'The Routledge Handbook of Terrorism Research'. Abingdon: Routledge; FP6-project (financed by European Commission) 'Transnational Terrorism, Security & the Rule of Law', Concepts of Terrorism: Analysis of the rise, decline, trends and risk, December 2008, available online: www.transnationalterrorism.eu.

law, of the use force or the practice of targeted killing against terrorists, pursuant to Article 51 of the U.N. Charter and the laws of war. Lastly, it is not concerned with domestic acts of terrorism, that is, crimes which occur and are prosecuted wholly within the territory of a single State, such as the Chechen hostage crisis in Moscow in 2002;⁸⁹ the Bogota bombing in 2003;⁹⁰ the Madrid train bombings in 2004;⁹¹ and the London bombings in 2005.⁹² As the Appeals Chamber for the Special Tribunal for Lebanon put it, ‘the requirement of a cross-border element goes ...to its character as *international* rather than *domestic*’.⁹³ The ‘cross-border element’ may take many different forms and is illustrated, for example, by the terrorist attacks on 11 September 2001 on the World Trade Centre and the Pentagon, which, though clearly occurring primarily on U.S.’ territory and resulting in the loss of nearly 3,000 lives, the destruction of hundreds of millions of dollars in property and severe damage to the American economy, were carried out by foreign nationals who were part of a transnational conspiracy and received their orders, funding, training and support from persons in foreign countries.⁹⁴ A further example of the ‘cross-border element’ is an act of terrorism committed in the territory of one State against, for example, the nationals or diplomatic personnel or premises of one or more foreign States. While the nature of the ‘new terrorism’, to a certain extent, dissolves any neat distinction between ‘domestic’ and ‘international’ terrorism, nevertheless, such a distinction, for the purpose of jurisdiction in international law, is necessary and important, and accordingly it is one that has long been made by counter-terrorism conventions.⁹⁵

1.8. Central Argument of the Study

The central argument of this study is that protective jurisdiction, though regarded as contentious and given little consideration in legal scholarship, is more established in historical and modern State practice than is generally appreciated. The empirical research into contemporary State practice and the detailed analysis of national laws

⁸⁹ S/RES/1440 (24 October 2002).

⁹⁰ S/RES/1465 (13 February 2003).

⁹¹ S/RES/1530 (11 March 2004).

⁹² S/RES/1611 (7 July 2005).

⁹³ Special Tribunal for Lebanon, *supra* n 87, para.89.

⁹⁴ *U.S. v Khalid Sheikh Mohammed et al.*, (S14) 93 Cr.180 (KTD) (Indictment); U.S. Office of Military Commissions, MC Form 458, Charge Sheet (31 May 2011) [KSM5]; *U.S. v Hamdan*, 801 F. Supp. 2d 1247 (C.M.C.R., 24 June 2011); Brief of Petitioner *Salim Ahmed Hamdan*, *Hamdan v U.S.*, No. 11-1257, 2011 WL 5569434, (D.C. Cir., 15 November 2011).

⁹⁵ E.g., 1979 International Convention Against the Taking of Hostages, 1316 U.N.T.S. 205, Article 13; 1997 International Convention for the Suppression of Terrorist Bombings, 2149 U.N.T.S. 256, Article 3.

shows that protective jurisdiction is the principal means by which States combat international terrorism, a trend that has been encouraged by counter-terrorism treaties and the adoption of binding resolutions by the Security Council. It may be possible, based on this practice, to enumerate a core category of vital interests that States have included under the ambit of protective jurisdiction *lex lata*. These vital interests, which States have in common, may be said to be ‘shared’ by the international community. That is, the protection of such interests has sufficient uniformity in the practice of the international community of States. These shared vital interests could provide a means by which to define protective jurisdiction in contemporary customary international law and is referred to as a ‘shared vital State interests’ approach.

In that connection, and contrary to the collective belief, discussed above, the use of the obligation to extradite or prosecute in counter-terrorism treaties should not automatically be interpreted as impliedly codifying a theory of universal jurisdiction. The reason for this suggestion is that it gives insufficient consideration to the nature of the threat posed by international terrorism and the reason why States negotiate the adoption of such treaties in order to combat it; more importantly, it conflates the treaty obligation to extradite or prosecute with the theory of universal jurisdiction, both of which are capable of having different rationales; and, more fundamentally, it misinterprets the protection of ‘shared vital State interests’ as the protection of ‘international community values’.⁹⁶ An alternative interpretation of the prescriptive jurisdiction arising out of the extradite or prosecute principle, proposed by the present study, is a form of ‘treaty-based jurisdiction’, which States are able to use in order more effectively to protect certain of their vital interests. Indeed, this jurisdiction enables

⁹⁶ Special Tribunal for Lebanon, *supra* n 87, at pp.50-51; Akehurst, *supra* n 7, at pp.161-162; Augenstein *et al.*, *supra* n 52, para.169; Cassese (2003), *supra* n 27, at p.593; Randall, *supra* n 40, at pp.817-819; Ryngaert, *supra* n 1, at p.101; Scharf, *supra* n 26, at pp.283-285; Shaw, *supra* n 2, at pp.668, 678; ‘African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes’, African Union, Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, Addis Ababa, Ethiopia, EXP/MIN/Legal/VI Rev.1, in African Union, Executive Council, Twenty-First Ordinary Session 9–13 July 2012, ‘The Report, the Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General’, EX.CL/731(XXI), Annex EX.CL/731(XXI)c; Gehr, W. (2002). ‘The Universal Legal Framework Against Nuclear Terrorism’, at p.10, available online: www.oecd-neo.org/law/nlb/nlb-79/005-015%20%20Article%20W.%20Gehr.pdf; Gehr, W. (2006). ‘The Universal Legal Framework Against Terrorism’, available online: www.unodc.org/tldb/bibliography/Biblio_LegalFramework_Gehr_2006.doc; UNODC, ‘(Draft) Guide for the Legislative Incorporation and Implementation of the Universal Instruments Against Terrorism’, at p.146, available online: www.unodc.org/tldb/en/legislative_guides.html; *Flatlow v Islamic Republic of Iran*, 999 F.Supp.1 (1998), at p.14; *U.S. v Yunis* 681 F.Supp.896 (1988), at pp.900-901; Cassese, A. (2001). ‘Terrorism is Also Disrupting Some Crucial Legal Categories of International Law’. 12 *EJIL* 993, at p.994.

States to prosecute treaty-offences committed by foreign nationals abroad, without having to evidence any nexus with the alleged offence, as soon as the accused is present on its territory, or otherwise have the accused prosecuted on its behalf, failing extradition. This interpretation *inter alia* has already been explained by the present author elsewhere and this study is limited to a summary of the key findings.⁹⁷ It is therefore necessary to reconsider the relationship between extradite or prosecute and universal jurisdiction and, for the purpose of conceptual clarity, to make an important distinction between the protection of ‘shared vital State interests’ and ‘international community values’, to which they will be referred throughout this study.⁹⁸

In the light of the State practice examined by the present study and also the decision by the ILC to include ‘Extraterritorial jurisdiction’ in its long-term programme of work, the codification of protective jurisdiction and the clarification of its relationship with other grounds of jurisdiction is necessary and desirable more than ever before. The adoption of such an instrument could be used to complement and ‘fill in’ the gaps left by the existing regime of counter-terrorism treaties.

1.9. Research Methodology and Method

It is useful, at this stage, to explain the methodological framework used to underpin the present study. This is important, for methodology informs how law is conceptualised and understood and, as will be explained, is linked to the type of research questions asked and the method used to identify, collect and analyse data.⁹⁹ Methodological approaches thereby entail theoretical and practical significance. This study is based on legal positivism. Before explaining the reasons for using this approach, it is perhaps useful to first say a few words on the meaning of legal positivism.

1.9.1. Legal Positivism

The core tenet of positivist legal theory is that ‘valid’ law is created and laid down by

⁹⁷ Garrod, M., ‘The Unreasoned Relationship between Extradite or Prosecute and Universal Jurisdiction in International Law in Light of the Judgment by the ICJ in *Belgium v Senegal*’ (under review by the *Chinese ILJ*).

⁹⁸ See also Kreß, *supra* n 27, at pp.566-567; Yee, *supra* n 27.

⁹⁹ Cryer, R. & Harvey, T. & Sokhi-Bulley, B. & Bohm, A. (2011). ‘Research Methodologies in EU and International Law’. Oxford: Hart.

recognised law-making bodies.¹⁰⁰ The central aim, or aspiration, of positivism is therefore to provide the intellectual and practical tools whereby the law can be identified and described ‘as it is’, in terms of formal criteria, and, in turn, distinguished from extra-legal sources, such as coercion, morality and religious doctrine. Legal positivism may be understood as the ‘need to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be’.¹⁰¹ Under the theory of legal positivism, law is observable empirically, such as in the form of legislation, custom, adjudication by courts and the practice of legal institutions.

It should be noted, from the outset, that the legal positivist theory has been the subject of criticism for being an outdated, conservative and rigid methodology, and because it gives insufficient consideration to broader external and contextual factors, such as morality, power and political and social and economic forces, which may shape and influence the law’s creation, development and practical operation.¹⁰² These issues, which continue to dominate contemporary legal theoretical debate, are beyond the present study’s scope. It is important, nevertheless, that the limitations of positivism, as with all other theories of legal research, are not exaggerated. It has to be borne in mind, moreover, that these theories undergo continual evolution, and it is safe to say that the modern, enlightened positivist method of today would have been unrecognisable to the classical view in the nineteenth century.¹⁰³ For instance, many modern positivists accept that there can be more than one possible ‘correct’ interpretation of the law.¹⁰⁴ Nor do many modern positivists accept that law is objective and independent of its context.¹⁰⁵ It is also important not to become bogged down with the question of whether there are necessary connections between law and morality, as did Hart and Fuller, which in the end turned out to be a somewhat misconceived debate.¹⁰⁶ While there is no necessary

¹⁰⁰ *Ibid.*, at pp.37-41; also McCoubrey, H. & White, N.D. ‘Textbook on Jurisprudence’. Blackstone: London, chapter 3.

¹⁰¹ Hart, H.L.A. (1958). ‘Positivism and the Separation of Law and Morals’. 71 *Harv.L.Rev.* 593, at p.594; also Paulus, A.J. & Simma, B. (1999). ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts—A Positivist View’. 93 *AJIL* 302, at p.303.

¹⁰² McCoubrey & White, *supra* n 100, chapter 8; Dyzenhaus, D. (2000). ‘Positivism’s Stagnant Research Programme’. 20 *OJLS* 703.

¹⁰³ Paulus & Simma, *supra* n 101; also Ratner, S.R. & Slaughter, A.M. (eds.) (1999). ‘Symposium on Method in International Law. Appraising the Methods of International Law: A Prospectus for Readers’. 93 *AJIL* 291, at p.295; Weiler, J.H.H. & Paulus, A.J. (1997). ‘The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?’. 8 *EJIL* 545, at p.548.

¹⁰⁴ Paulus & Simma, *ibid.*, at p.307; Cryer *et al.*, *supra* n 99, at p.39.

¹⁰⁵ Paulus & Simma, *ibid.*, at pp.306-307.

¹⁰⁶ McCoubrey & White, *supra* n 100, at pp.46-48.

conceptual connection between law and morality in order for law to be valid, many legal positivists are of the view that morality and the law are capable of coinciding and overlapping and that a perhaps more important consideration is the identification of law. Thus, while positivism is concerned with identifying the law ‘as it is’, this does not necessarily mean that important moral questions have no relevance in terms of what rules become valid ‘law’, or the quite separate issue of how judges decide cases.¹⁰⁷ A positivist approach is useful for identifying the law in order to then subject the law to critique, including moral critique, and to show how and why the law, and its practical operation, may, in fact, be influenced by broader contextual factors.

1.9.2. Reasons for using Legal Positivism

Positivism is among the most influential theoretical approaches to international legal scholarship.¹⁰⁸ It is suited, in particular, to research concerning the identification and explanation of the law; analysis of complex legal texts; systematisation of legal norms; and understanding the relationship between different legal norms.¹⁰⁹ These considerations are of importance to the present study. Indeed, as has already been explained above, there is little understanding by courts and in legal scholarship of protective jurisdiction, which has since the Harvard Research been confused, to varying degrees, with other grounds of jurisdiction. The result of this confusion means that theories invoked in order to support particular assertions of jurisdiction do not always reflect the law, *lex lata*, or describe it with sufficient accuracy. The use of positivism, which has as its most basic aim the description of the law ‘as it is’, in order to provide a more rigorous analysis of jurisdiction is therefore more important than ever before. A further reason for using a positivist approach is because methodologies have important implications, not only for the way in which law is conceptualised but also for concepts of the State and its sovereignty. Positivism is distinctly State-centred; the concept of the State and its sovereignty are of fundamental and primary importance in international law and international relations. Jurisdiction is a manifestation of sovereignty and, as will be shown, protective jurisdiction has as its purpose the protection of sovereignty and certain other shared vital State interests. A positivist approach is also useful for identifying the shortcomings of and gaps in the law, *lex lata*, and for proposing law

¹⁰⁷ Hart, *supra* n 101; McCoubrey & White, *ibid.*, at p.51; Gardner, J. (2001). ‘Legal Positivism: 5 ½ Myths’. 46 *American Journal of Jurisprudence* 199, at p.222.

¹⁰⁸ Ratner & Slaughter, *supra* n 103, at p.293.

¹⁰⁹ Cryer *et al.*, *supra* n 99, at p.38.

reform; one of the aims of the present study is to assess the advantages and disadvantages of the codification of protective jurisdiction.

Inherent in legal positivism is a critical approach to examining the law and the way in which the law has developed and is enforced; indeed, it is not concerned with the mere description or acceptance of the law at face value. It is therefore important to examine the law ‘as it is’, as claimed or described by recognised law-making bodies, critically and with sufficient rigour and depth, in order to draw out shortcomings, inconsistencies and contradictions, particularly as such claims may themselves be based on misinterpretations or misunderstandings. This is best illustrated, perhaps, by grounds of jurisdiction.

A critical approach to examining the law is all the more important in respect of one particular method by which to identify the law ‘as it is’, namely, the ‘modern positivist’ understanding of the process of international law-making.¹¹⁰ This method focuses on the evolution of customary international law by placing significant weight on ‘verbal State practice’, rather than on ‘hard’, or ‘physical’, State practice as required by the test adopted by the ICJ in the *North Sea Continental Shelf* cases.¹¹¹ The ILC has interpreted verbal practice not as State practice *stricto sensu* but, rather, ‘as secondary sources of information regarding State practice’ in its use of materials for identifying customary rules.¹¹² There is, in principle, nothing wrong with this method for identifying customary international law. However, for several reasons, a cautionary approach is needed in relying on and interpreting such practice and, in turn, the customary rules deduced in this way. First of all, the nomenclature used by States and courts in order to describe the law may be based on little more than ‘loose language’ and without undertaking an inquiry into the law or going into the matter in depth; verbal practice may be based on lofty language, for example, that used in political declarations or preambular paragraphs of multilateral treaties; verbal practice may not be sufficiently tested judicially or in inter-State disputes; verbal practice may be irrelevant to the specific issue, or it may not sit neatly with, and may even be contradicted, by physical practice; verbal practice may even be based on misinterpretations of physical practice or

¹¹⁰ See Paulus & Simma, *supra* n 101, at p.302; Kreß, *supra* n 27, at pp.573-576.

¹¹¹ *North Sea Continental Shelf cases*, Judgment, I.C.J. Reports 1969, p.3.

¹¹² U.N. Doc.A/CN.4/659 (14 March 2013), para.24.

of the way in which rules of customary international law have traditionally developed; and, lastly, verbal practice may not necessarily reflect *opinio juris*, that is, the belief of States with regard to the existence or content of a given rule. Conversely, *opinio juris* may be informed by, or based on, inaccurate or incorrect verbal descriptions of the law and such belief may not sit neatly with physical practice. It has to be borne in mind that courts and commentators relying on this method risk oversimplification and may misinterpret customary rules or describe such rules with insufficient accuracy. In that respect, the work by Kreß, one of the proponents of the modern positivist method, is particularly illustrative.

Kreß has asserted the ‘undeniably customary title to universal jurisdiction in the case of piracy’,¹¹³ despite not having undertaken any research or analysis of primary or secondary sources. According to Kreß, by adopting the ‘modern positivist’ method, it is ‘evident’ that what has emerged from ‘verbal’ State practice is ‘the existence of true universal jurisdiction over all the crimes under international law’.¹¹⁴ Kreß went on to conclude that:

... customary international law empowers States to exercise universal (prescriptive and adjudicative) jurisdiction over genocide, crimes against humanity and war crimes to the extent that such crimes have acquired the status of general customary international law.¹¹⁵

It is evident that Kreß assumed that universal jurisdiction developed historically in ‘hard’ State practice and already existed as an undeniable rule of customary international law in respect of piracy, which Kreß then assumed may be expanded to cover ‘all’ crimes under international law. In respect of the modern positivist method, the verbal State practice cited as proof by Kreß is a singular preambular paragraph of the Statute of the International Criminal Court (ICC).¹¹⁶ The conclusion reached by Kreß *inter alia* is potentially misleading. The preambular paragraph, to which Kreß refers, contains rather loose language agreed upon by States, which does not sit neatly with the different, and perhaps more important, operative provisions from the same source. Nonetheless, Kreß assumes that all crimes under international law are *ipso facto* subject to universal jurisdiction. The same line of reasoning leads Kreß to suggest that

¹¹³ Kreß, *supra* n 27, at p.569.

¹¹⁴ *Ibid.*, at p.573.

¹¹⁵ *Ibid.*, at p.576.

¹¹⁶ *Ibid.*, at p.574.

the obligation to extradite or prosecute, where it is used in treaties that proscribe conduct that is criminal under international law, is also the codification of universal jurisdiction. As will be explained in chapter five, this appears to misinterpret the effect of the obligation to extradite or prosecute and, ultimately, the law ‘as it is’. It is worth noting, by way of aside, that the potential misinterpretation of the formation and sources of evidence of custom is one of the reasons why the ILC, in 2012, included this topic in its programme of work.¹¹⁷

Although legal positivism provides a critical approach for analysing the law, it is different from, and is not to be confused with, what have been described under the broad label as ‘critical approaches’, which includes Marxist, postcolonial, third world, feminist and critical theories.¹¹⁸ These latter approaches are said to differ from more traditional methodologies, such as positivism and naturalism, in that they provide a ‘critique’ of the law from a particular theoretical perspective, and they share a common ‘concern with the extent to which purportedly neutral concepts are neither neutral ‘givens’, nor neutral, but rather cultural constructs usually blind to themselves’.¹¹⁹ They also challenge legal scholarship by pointing out the ways in which the law both represents and is made up of power relations.¹²⁰ It is not suggested that critical approaches are inappropriate for the study of extraterritorial jurisdiction.¹²¹ Rather, a more fundamental issue is to first establish more clearly what the protective principle is and this is best done through a positivist analysis. Moreover, positivism may equally be used to provide a critique of the law and of legal scholarship, such as where the law is depicted as neutral, self-evident and universal. Positivism therefore provides a suitable methodology to realise the goals of the present research project.

1.9.3. Doctrinal Research Method

As the present study examines jurisdiction in international law, and the law of jurisdiction is, in the absence of treaty law, primarily customary international law, it is useful to set out the method for ascertaining customary international law that will be used. Method is different from, although is related to, methodology. Method is the way

¹¹⁷ U.N. Doc.67/10 (2012), para.19.

¹¹⁸ Cryer, *et al.*, *supra* n 99, at pp.59-75.

¹¹⁹ *Ibid.*, at p.60.

¹²⁰ *Ibid.*, at p.61.

¹²¹ E.g., Gathii, J.T. (2010). ‘Kenya’s Piracy Prosecutions’. 104 *AJIL* 416.

in which the research project is pursued and research questions are answered. As noted above, the methodology used to underpin research determines the type of method used to collect and analyse data. The method of legal research based on positivism is referred to as doctrinal legal research. There is no single, all-encompassing definition of doctrinal legal research. Nevertheless, it may be said that this method has at its core the systematic and in-depth exposition of the law. Such exposition can include the law's historical development, the relationship between different rules, clarifying ambiguities within rules and the law's operation in practice. It also consists of explaining the problems with and identifying the shortcomings of the law, providing a critique of the law, as well as making proposals for the future development of the law. Doctrinal research is centred on critically analysing the content of primary sources of material, for example, the judgments of courts, legislation, treaties and the *trévoux préparatoires* of treaties, policy documents, archival documents, resolutions and reports adopted by General Assembly and Security Council, and other documents originating from lawmakers and institutions at the national, regional and international level, as well as the writings of renowned jurists and scholarship.

Research methods are not free from criticism, and doctrinal research is certainly no exception.¹²² Many scholars using a doctrinal method take what may be described as an 'internal' or 'inward' perspective in studying the law, but it is exactly this feature of doctrinal research which is most often criticised for being overly narrow.¹²³ It is certainly the case that such an approach can mean that the law may be studied in the abstract, isolated from important social, political and economic contextual factors which may otherwise explain *why* the law has developed in the way that it has, or *how* it is selectively enforced.¹²⁴ This has led to the argument that the doctrinal legal research method should be replaced, or at least supplemented, by a 'law in context', or what is often described as a 'socio-legal research', approach.¹²⁵

¹²² See Salter, M. & Mason, J. (2007). 'Writing Law Dissertations: An Introduction and Guide to Conduct of Legal Research'. Essex: Pearson, at pp.112-118.

¹²³ Vick, D. (2004). 'Interdisciplinarity and the Discipline of Law'. 31 *Journal of Law and Society* 163, at p.164; Bradney, A. (1998). 'Law as a Parasitic Discipline'. 25 *Journal of Law and Society* 71, at p.76; Posner, R.A. (2001-2002). 'Legal Scholarship Today'. 115 *Harv.L.Rev.* 1314, at pp.1315, 1321; Rhode, D.L. (2001-2002). 'Legal Scholarship'. 115 *Harv.L.Rev.* 1327, at p.1342.

¹²⁴ A pertinent example is Rubin (1998), *supra* n 39.

¹²⁵ Cownie, F. (2004). 'Legal Academics: Culture and Identities'. Oxford: Hart, at pp.197-198; Singhal, A.K. & Malik, I. (2012). 'Doctrinal and socio-legal methods of research: merits and demerits'. 2 *Educational Research Journal* 252, at p.253; Hutchinson, T.C. (2008). 'Developing legal research skills: expanding the paradigm'. 32 *Melbourne University Law Review* 1065, at p.1087; Bradney, *supra* n 123,

It is difficult to come up with one generally accepted definition of what is a socio-legal approach to the study of the law.¹²⁶ In general terms this approach has been described as placing emphasis on law in action, with a focus on the use of empirical research of the law and of the broader social, political and economic context in which the law develops and operates. The emphasis placed on the use of empirical research is apparently in order to understand ‘how the law works in the real world’.¹²⁷

It is important, however, that criticism of the doctrinal research method is not overstated.¹²⁸ While many scholars using doctrinal research may adopt a narrow, inward perspective in studying the law, this does not have to be the case, and there are many different genres within doctrinal work. Doctrinal research is useful in order to study the law in textual analysis, as well as the law in action, or in the ‘real world’, and to critically assess whether or not the law presented in doctrine corresponds with the law’s operation.¹²⁹ It is thus a somewhat artificial and misplaced proposition, and perhaps even an outdated one, that doctrinal research is too simple, narrow, rigid, theoretical and uncritical, and is incapable of examining the law in its broader context, in its practical operation.¹³⁰ It is also worth noting that doctrinal research has moved beyond seeing legal research as a matter of discovering law that is autonomously somewhere ‘out there’ waiting to be found in order to provide the one and only right answer to a legal problem.¹³¹ The legal doctrinal paradigm is, all too often, criticised from the perspective of its nineteenth century, formalistic origins and the claim of positive science to objective knowledge, or otherwise from that of the traditional role of legal practitioners, which is based on a narrow framework of tracing common law precedent and legislative interpretation, and usually limited to a particular dispute between parties. This tends to result, unwarrantedly, in doctrinal research being undervalued or of lacking importance in legal research. The doctrinal and socio-legal approaches should, in any case, be seen

at p.79.

¹²⁶ Salter & Mason, *supra* n 122, chapter 5.

¹²⁷ Genn, H. & Partington, M. & Wheeler, S. (2006). ‘Law in the Real World: Improving Our Understanding of How Law Works’. Nuffield Foundation, Final Report and Recommendations, available online:

www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry_report.pdf.

¹²⁸ Rhode, *supra* n 123, at pp.1337-1338.

¹²⁹ McCrudden, C. (2006). ‘Legal research and social sciences’. 122 *LQR* 632, at pp.633-634.

¹³⁰ Gestel, R.V. & Miclitz, H.W. (2011). ‘Revitalising Doctrinal Legal Research in Europe: What About Methodology?’. European University Institute Working Papers, Law 2011/05.

¹³¹ *Ibid.*, at p.5; Pendleleton, M., ‘Non-empirical Discovery in Legal Scholarship-Choosing, Researching and Writing a Traditional Scholarly Article’, in McConville, M. & Hong Chui, W. (2007). ‘Research Methods for Law’. Edinburgh: EUP, at p.162; McCrudden, *supra* n 129, at p.644.

as complementary and intertwined, rather than distinctly separate and irreconcilable.¹³²

A broader issue, however, is that the doctrinal method is rarely discussed or articulated in legal scholarship and therefore there tends to be a lack of understanding of either what this method is or of what it entails.¹³³ In that connection, a more important issue, perhaps, is not the method itself, but, rather, the way in which this method is used by courts and in legal scholarship. Doctrinal analysis, despite being the method of choice for the vast majority of legal scholars, is not always done well.¹³⁴ The existing studies on jurisdiction in international law, the vast majority of which have used the doctrinal method, lack sufficient rigor. Indeed, as has already been discussed above, one of the reasons why the historical development of protective principle jurisdiction over piracy, and its subsequent expansion to include war crimes in the aftermath of World War II, has been interpreted by courts and in legal scholarship as the theory of universal jurisdiction, for the protection of ‘international community values’, is due to the lack of analysis of primary sources, or else the citation of primary sources wholly out of their proper context, and, as is more often the case, the overreliance on tentative secondary sources.¹³⁵ This ultimately leads to a misinterpretation of jurisdiction in international law.¹³⁶

The present study uses the doctrinal method in order to identify and examine the law ‘as it is’, although it takes what may be described as a more ‘outward’ or ‘external’ perspective by also examining the law’s development and operation in context, and the study is immersed in a variety of contemporary and historical primary and secondary sources. The operation of the law in society and, from the perspective of international law, within the international community, is just as important as understanding the law in and of itself. The doctrinal method is supplemented in the present study with an extensive empirical analysis of the national laws of 181 States, in order to provide for a more comprehensive understanding of protective principle jurisdiction in contemporary

¹³² McCrudden, *ibid.*, at pp.641-642.

¹³³ Hutchinson, T. & Duncan, N. (2012). ‘Defining and Describing What We Do: Doctrinal Legal Research’. 17 *Deakin Law Review* 83.

¹³⁴ Rhode, *supra* n 123, at p.1340; also Posner, R.A. (2008). ‘How Judges Think’. Harvard: HUP, at p.211.

¹³⁵ E.g. Kreß, *supra* n 27, at p.569, citing Randall, *supra* n 40; Scharf, *supra* n 26; Scharf, M.P. (2000-2001). ‘Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States’. 35 *NewEng.L.Rev.* 363, at p.369; Scharf, M.P. (2012). ‘Universal Jurisdiction and the Crime of Aggression’. 53 *HarvInt’lL.J.* 357.

¹³⁶ Garrod, *supra* n 39, at p.5; Garrod, *supra* n 42, at pp.796-797.

State practice and to show that it has developed as a rule of customary international law for the protection of a core category of shared vital State interests. These national laws, as will be explained, have been enacted by States and used in response to international terrorism. It is also worth noting that these national laws include the implementation by States of counter-terrorism conventions. In accordance with the central argument, outlined above, the use of the obligation to extradite or prosecute in these treaties is interpreted by the present study as broad treaty-based jurisdiction, as opposed to a theory of universal jurisdiction, which States parties have used in order more effectively to protect certain of their vital interests; the national laws adopted by States in order to implement these treaties is interpreted as State practice in support of protective jurisdiction. The method of data collection, and the interpretation and limitations of this data, are discussed further in chapter three.

1.10. Research Questions

The present study has advanced the following research questions:

1. What is the protective principle of extraterritorial criminal jurisdiction?
2. How has protective jurisdiction developed?
3. What is the relationship between protective and other grounds of extraterritorial jurisdiction?
4. How does protective jurisdiction fit within the framework of international law?
5. Whether and, if so, to what extent, is protective jurisdiction used in State practice for combatting the threat of international terrorism?
6. Is the codification of protective jurisdiction necessary and desirable?

1.11. Structure of the Study

This study examines protective jurisdiction and its use for combatting the threat of international terrorism. This examination begins in chapter two with the rationale of protective jurisdiction and the interests that it serves. The modern rationalisation of protective jurisdiction is based on three interrelated grounds. The first of these is the mutually beneficial need by States to protect certain of their vital interests, a number of which are shared by the international community, by offences emanating from outside their territorial borders. The protective principle is the only recognised ground of extraterritorial jurisdiction in international law over offences occurring wholly outside

the State's territory, including inchoate and preparatory offences, which threaten or implicate vital interests, as well as those interests which are located abroad, and where no constituent element of an offence or other tangible effect has actually been felt within the prescribing State's territory. The two other related grounds justifying protective jurisdiction are, first of all, that the adequate protection of vital interests cannot be wholly entrusted to other States; and, secondly, international law does not impose sufficient obligations on States to protect such interests or adequately hold States responsible for the failure to protect such interests by non-State actors. The protection of vital interests provides a sufficiently close connection between the legislating State and the impugned conduct and justifies in international law a limited amount of interference in the territorial sovereignty and internal affairs of other States. However, the same prescriptive connection is not required to be established by international law in the case of piracy on the high seas. This distinction regarding the requirement to evidence a prescriptive connection is one of great importance for, as will be explained, the latter has been misinterpreted during the twentieth century as a ground of universal jurisdiction for the protection of international community values. The rationale of protective jurisdiction, which does not require a connection with an alleged offence to be established, other than where the offence implicates or threatens vital interests, is of great importance for combatting transnational crimes, including the problem of international terrorism.

The third chapter shows that grounds of extraterritorial jurisdiction have traditionally been little understood and, more often than not, subject to considerable confusion. The chapter sheds important light on the way in which protective jurisdiction has traditionally developed and examines the various efforts made to codify extraterritorial jurisdiction during the first half of the twentieth century. The reason for this is that it is not possible to understand the reason why protective jurisdiction is presently little understood and why there has emerged a collective belief, discussed above, without understanding these codification efforts. This is particularly relevant to the later discussion of the obligation to extradite or prosecute in counter-terrorism treaties for the protection of shared vital State interests, in chapter five, and the codification of protective jurisdiction by the ILC, in chapter six.

Chapter four presents the key findings of empirical research into contemporary State

practice and a detailed analysis of national laws, the purpose of which is to shed important light on whether, and, if so, to what extent, protective jurisdiction is used for combatting international terrorism. It shows that protective jurisdiction has been at the heart of the response to, and is the principal means by which States combat, the threat of international terrorism. This practice, which has been encouraged by the Security Council, acting under Chapter VII, may be sufficiently widespread and uniform to permit the codification of protective jurisdiction. An effort is made to systematise offences into categories, in order to identify more general themes and trends in national laws, in particular the types of vital interests that have been included under the ambit of protective jurisdiction *lex lata*. The findings of this chapter are important not only for showing that protective jurisdiction is used more widely than is commonly understood and for clarifying some of the uncertainty surrounding the most appropriate grounds of jurisdiction for combating international terrorism; they are also of particular importance for defining protective jurisdiction in contemporary customary international law, in chapter five, and discussing the codification of protective jurisdiction by the ILC, in chapter six.

Chapter five sheds important light on the definition of protective jurisdiction in contemporary customary international law. It proposes that it may be possible to define protective jurisdiction, *lex lata*, based on vital interests. This approach, which was first proposed by the Harvard Research, differs from defining protective jurisdiction based on a narrow list of offences. The latter approach is problematic in that national laws would be difficult, if not impossible, to harmonise and risks being overly rigid and inflexible for responding to the complex and evolving threat of international terrorism. The chapter enumerates, by building on the empirical research into State practice in chapter four, 13 vital interests that have been included under protective jurisdiction *lex lata*. In addition to national laws, there are a number of other sources by which the inclusion of vital interests under protective jurisdiction is verified, namely judicial practice, counter-terrorism treaties and the practice of the Security Council. It proposes *lex ferenda* that 10 of these vital State interests are shared by the international community and could be used as a way of defining and codifying protective jurisdiction. Chapter five also makes a fundamental conceptual distinction between jurisdiction for the protection of ‘shared vital State interests’ and ‘international community values’. The reason for making this distinction, at least in the context of

counter-terrorism treaties, is because of the collective belief, discussed above, that the obligation to extradite or prosecute impliedly codifies a ground of universal jurisdiction for the protection of international community values.

In the light of the recent decision by the ILC to include the codification of extraterritorial jurisdiction in its long-term programme of work, chapter six concludes by discussing the codification of protective jurisdiction as a necessary and desirable way forward and the principal advantages and disadvantages of the adoption of such an instrument by the ILC, in particular its use for filling in gaps left by the existing international legal regime for combatting international terrorism.

Chapter Two

‘The Rationale of Protective Principle Jurisdiction’

2.1. Introduction

Protective jurisdiction has developed under customary international law over a period of several centuries and to varying degrees in the practice of different States, although the full extent of the diverse historical ‘origins’ of this jurisdiction are not yet fully understood. It was not until the early twentieth century, when a number of public and private efforts were made to codify jurisdiction in international law, that the nomenclature ‘protective principle’ was used and the rationale of this jurisdiction was given substantive consideration. One of the main reasons for this, as will be explained below, is that protective jurisdiction has traditionally been treated as a part of, and justified under, two broader rights in international law, both of which were used by States to protect their vital interests, namely self-defence and necessity. The purpose of this chapter is to explain the modern rationalisation of protective jurisdiction in international law. The theoretical justification for this jurisdiction, as will be explained, is based on three interrelated grounds. The first of these is the mutually beneficial need by States to protect themselves and certain of their vital interests, a number of which are shared by the international community, from offences emanating outside their territorial borders. The territoriality of jurisdiction, in and of itself, is wholly inadequate for the protection of such interests. The theories of territoriality and protection therefore ought to be treated as complementary, rather than in opposition, to each other. The two other related grounds justifying protective jurisdiction are, firstly, that the adequate protection of vital interests cannot be wholly entrusted to other States; and, secondly, international law does not impose sufficient obligations on States to protect such interests or adequately hold States responsible for the failure to protect such interests by non-State actors.

It is important to make clear, from the outset, that the protection of vital interests evidences a sufficiently close connection between the legislating State and the impugned conduct and justifies in international law a limited amount of interference in the territorial sovereignty and internal affairs of other States. However, the same

prescriptive connection is not required by international law to be evidenced in the case of piracy on the high seas. The reason why international law has traditionally permitted this ‘no nexus requirement’, as it will be referred to, is because the high seas are beyond the exclusive territorial sovereignty of any State and pirates are deemed to fall outside the flag protection of any State. Thus, it is not necessary, as a matter of international law, for a State to justify the assertion of protective jurisdiction over pirates on the high seas by evidencing in national laws, or proving in inter-State disputes, a prescriptive connection with its vital interests. This distinction regarding the requirement to evidence a prescriptive connection is of one great importance for, as will be explained, the latter has arguably been misinterpreted during the twentieth century as a ground of universal jurisdiction for the protection of international community values.

The chapter begins, in part one, by examining the traditional rationale of protective jurisdiction, which was, until the early twentieth century, justified in international law based on the broader and well-established rights of self-defence and necessity. In this regard, an important difference existed between Anglo-American countries, such as Britain and the U.S., and countries in continental Europe, such as France. The former tended to exercise protective jurisdiction as part of a broad right of self-defence and necessity and treated them as one and the same. The latter justified protective jurisdiction based on self-defence and necessity but also made provision for such jurisdiction in their criminal codes independently from the rights of self-defence and necessity. It was not until the twentieth century, when the rights of self-defence and necessity began to be restricted, and public and private efforts were made to codify jurisdiction in international law, that protective jurisdiction and its rationale were treated independently from self-defence and necessity. Thereafter, in part two, the chapter explains the modern rationalisation of protective jurisdiction in international law, particularly from the perspective of those attempting to codify the international law of jurisdiction. The chapter concludes that protective jurisdiction is the only recognised theory of extraterritorial jurisdiction in international law over offences occurring wholly outside the State’s territory, including inchoate and preparatory offences, which threaten or implicate vital State interests, as well as those interests which are located abroad, and where no constituent element of an offence or other tangible effect has actually been felt within the proscribing State’s territory. This makes the rationale of this jurisdiction of great importance for combatting the complex and diffuse threat of international

terrorism.

2.2. Relationship between Protective Jurisdiction and Self-Defence and Necessity

The rationale of protective jurisdiction was not given substantive consideration until the early twentieth century, when public and private efforts were made to codify jurisdiction in international law. This was despite the fact that this ground of jurisdiction has varied historical origins and was, by the early nineteenth century, widely established in State practice.¹ The reason why this is so is because protective jurisdiction has traditionally been treated as being a part of, and justified under, two other well-established and broader rights in international law, both of which were used by States in order to protect their vital interests, namely self-defence and necessity. Before examining the modern rationalisation of protective jurisdiction in international law, particularly as it was understood by those attempting to codify jurisdiction, it is useful first to examine the relationship in international law between this jurisdiction and self-defence and necessity.

Prior to the twentieth century, protective jurisdiction was considered to be based on the sovereign's inherent right to defend itself under the doctrine of necessity and the right of self-defence.² This is best illustrated, perhaps, by the 1873 case of *Fornage*, in which the French Cour de Cassation held that the 'single exception' under the law of nations permitting a sovereign to punish foreign nationals for crimes committed outside its territory is for 'a crime against the safety of the state', which is 'founded on the right of legitimate self-defense'.³ The *Cutting* incident, which gave rise to a diplomatic dispute

¹ Chapter three.

² Westlake, J. (1910). 'International Law'. Cambridge: CUP, at p.262; Report of the Sub-Committee by Brierly, J.L. (Rapporteur) & De Visscher, C. 'Jurisdiction over Extraterritorial Crime', annexed to Committee of Experts for the Progressive Codification of International Law, 'Criminal Competence of States in respect of Offences Committed Outside their Territory', 20 *AJIL (Spec. Supp.)* (1926) 252, at p.257; *Case of the S.S. "Lotus" (France v Turkey)*, Judgment, PCIJ Reports 1927, Series A. No.10, at p.45 (Diss. Op. Judge Weiss); Bowett, D.W. (1958). 'Self-Defence in International Law'. Manchester: MUP, at pp.62-64; Cameron, C. (1994). 'The Protective Principle of International Criminal Jurisdiction'. Aldershot: Dartmouth, at pp.45-46; Donnedieu de Vabres, H.F.A. (1928). 'Les principes modernes du droit pénal international'. Paris: Librairie du Recueil Sirey, at p.86; Research on International Law under the Auspices of the Harvard Law School, Part II, 'Jurisdiction with Respect to Crime'. 29 *AJIL (Supp.)* (1935) 435 (Harvard Research), at p.552; Note (1973-1974). 'Extraterritorial Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law'. 72 *Mich.L.Rev.* 1087, at pp.1090, 1095; Paust, J.J. (1982-1983). 'Federal Jurisdiction over Extraterritorial Acts of Terrorism and Non-immunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine'. 23 *Va.J.Int.L.* 191, at p.210; Ryngaert, C. (2008). 'Jurisdiction in International Law'. Oxford: OUP, at p.97.

³ *Fornage* case (*Cour de Cassation*, 84 *J du Palais* 229, 1873), cited in Moore, J.B. (1887). 'Report on

between the U.S. and Mexico in 1886,⁴ led J.B. Moore, the Assistant Secretary of State for the U.S. Government, to undertake an extensive review of extraterritorial jurisdiction in State practice, which included the case of *Fornage*. Moore observed that:

[t]he punishment by a nation of extraterritorial offenses against the safety of the state, and the counterfeiting or forging of national seals, papers, moneys and bank bills is regarded as an exception to the general principles of criminal jurisprudence, and is placed by those who maintain and defend it upon the high ground of necessity and self defense.⁵

The same view was shared by the Institute of International Law, in the first private efforts to codify jurisdiction in international law, at its sessions in 1879 and 1883.⁶ In order to understand the reason why protective jurisdiction was traditionally justified under self-defence and necessity, it is useful to examine their relationship in State practice and the commentaries of jurists in the nineteenth century.

The relationship between protective jurisdiction and self-defence and necessity under customary international law has been given little consideration in legal scholarship. As with the rights of self-defence and necessity,⁷ protective jurisdiction appears to have been regarded as an exceptional and inherent right of the sovereign under the law of nations.⁸ Moreover, it seems that protective jurisdiction was treated as part of self-defence, which was itself an aspect of the very broad and vague rights of necessity and self-preservation. After examining the use of force in State practice and the commentaries of jurists in the nineteenth century, Brownlie found ‘self-defence’, on the one hand, and ‘self-preservation’, ‘self-protection’ and ‘necessity’, on the other, to be confused and interchangeable terms.⁹ Brownlie also found that the concept of self-defence was used synonymously or equated with necessity and self-preservation in

Extraterritorial Crime and the Cutting Case’. Washington: U.S. Department of State, Government Printing Office, at p.55.

⁴ See chapter three.

⁵ *Supra* n 3, at p.37.

⁶ Cited in Moore, *ibid.*, at pp.109 & 111, respectively.

⁷ Westlake, *supra* n 2, at pp.306, 313; Brownlie, I. (1961). ‘The Use of Force in Self-Defence’. 37 *BYIL* 183, at p.184; Higgins, R. (1961). ‘The Legal Limits to the Use of Force by Sovereign States United Nations Practice’. 37 *BYIL* 269, at p.302.

⁸ *Church v Hubbard*, 2 Cranch, U.S. 187 (1804), at pp.234-235; *Fornage* case, *supra* n 3, at pp.54-56; *U.S. v Rodriguez*, 182 F.Supp.479 (S.D. Cal., 1960), at p.491; *U.S. Pizzarusso*, 388 F.2d8 (2nd Cir., 1968), at pp.9-10; *U.S. v Gonzalez*, 776 F.2d931 (11th Cir., 1985); Hall, E.W., ‘A Treatise on International Law’ (ed. by Higgins, P.A. (Oxford: Clarendon, 1924)), at p.264; Hyde, C.C. (1922). ‘International Law’. Boston: Little, at p.426; see also authorities cited in Moore, *supra* n 3.

⁹ Brownlie, *supra* n 7, at pp.184-201.

order to justify defensive force.¹⁰

The right of self-preservation, which was used interchangeably with ‘self-protection’, was the sovereign’s inherent right and justified a broad range of self-protective measures against any violation of the rights and interests of the State or its subjects, whether committed by the offending State or its subjects.¹¹ Hall was of the view that self-preservation was applicable to all circumstances in which international law did not provide adequate protection to the State or its interests from harm.¹² The linking of self-defence with necessity and self-preservation, as had the jurists of modern international law, including Grotius, Hobbes, Puffendorf, Wolff and Vattel, created a right of ‘indefinite’ limits for the protection by the sovereign of what were variously described as its ‘essential’ or ‘fundamental’ or ‘vital’ interests.¹³ The bulk of the reasons behind the declarations of war by sovereigns during the several centuries prior to the early twentieth century were for the protection of their vital interests.¹⁴ As late as the twentieth century it was widely accepted that the State’s ‘superior vital interests’ could be protected by force as was necessary and, moreover, were beyond international arbitration in the determination of inter-State disputes, ‘as only the sovereign can be judge of them’.¹⁵ The concept of ‘vital’, ‘essential’ and ‘special’ interests was itself vague and included the protection of a range of political, economic and military interests, including the State’s security, independence, nationals and overseas trade, as well as sovereign honour and dignity.¹⁶

The broad concept of self-defence is of particular importance to the modern development of protective jurisdiction. Indeed, not only were self-defence and

¹⁰ *Ibid.*

¹¹ *Ibid.*; also Westlake, *supra* n 2, at pp.212-213; Phillimore, R. (1854). ‘Commentaries upon International Law’. Philadelphia: T. & J.W. Johnson, vol.I, at p.180; Twiss, T. (1861). ‘The Law of Nations Considered as Independent Political Communities. On the Right and Duties of Nations in Time of Peace’. Oxford: OUP, at p.144; De Vattel, E., ‘The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury’ (ed. by Kapossy, B. & Whitmore, R. (Indianapolis: Liberty Fund, 2008)), at p.88.

¹² Hall, *supra* n 8, at p.322.

¹³ Rodick, B.C. (1928). ‘The Doctrine of Necessity in International Law’. New York: CUP, chapter one; Brownlie, *supra* n 7, at p.187 and authorities cited therein; Higgins, *supra* n 7, at p.315; Brierly, J.L. (1924). 5 *BYIL* 4, at pp.6-10; also Boed, R. (2000). ‘State of Necessity as a Justification for Internationally Wrongful Conduct’. 3 *Yale Human Rights and Development L.J.* 1, at pp.4-7.

¹⁴ Von Elbe, J. (1939). ‘The Evolution of the Concept of Just War in International Law’. 33 *AJIL* 665, at pp.685-687.

¹⁵ Westlake, *supra* n 2, at pp.302-305; Brierly, *supra* n 13, at pp.6-7.

¹⁶ Higgins, *supra* n 7, at p.315; Rivier, ‘Principes du Droit des Gens’, cited in Westlake, *ibid.*, at p.306.

protective jurisdiction inherent rights of sovereignty but, as will be explained below, they also shared the same rationale, namely the protection of vital State interests. Moreover, protective jurisdiction was exercised as part of self-defence. Thus, Rodick has suggested that, since the close of the eighteenth century, States have declared that self-defence, necessity and self-preservation excused the action of the State for exercising criminal jurisdiction over foreign nationals for offences of a serious nature committed beyond its borders. This was especially the case if such offences were concerned with the counterfeiting of its currency, plotting against its ruler, or seeking to overthrow its existing government.¹⁷

The use of protective jurisdiction under the broad right of self-defence is evident in State practice in respect of the search and seizure of foreign vessels on the high seas in time of peace. For example, in the case of *Le Louis*, Sir William Scott held that States have under the law of nations a right to visit and search foreign vessels on the high seas, ‘particularly for fiscal and defensive regulations more immediately affecting their safety and welfare’, a right which existed, he asserted, as a matter of necessity ‘upon the ground of repelling injury, and as a measure of self-defence’.¹⁸ In the same case, Lord Stowell justified jurisdiction over piracy on the high seas on the ground that pirates are ‘subject to the extreme rights of war’. In a diplomatic dispute between the U.S. and Britain arising out of the *Caroline* incident of 1838, a group of armed rebels, a number of whom were U.S. citizens and taking refuge in the U.S., used the steamship, the *Caroline*, to mount attacks against British territory, property and nationals in Canada. The British Government dispatched a military expedition and destroyed the *Caroline*, which was justified under a broad right of self-defence, necessity and self-preservation. The British Government also claimed that the American rebels were ‘pirates’.¹⁹ The reason for this was presumably in order to justify in international law the same broad right of extraterritorial jurisdiction over the foreign rebels as it claimed over so-called pirates, should they fall into British hands. Indeed, Britain had, by the nineteenth century, begun to unilaterally claim that there existed a crime of ‘piracy’ under the law of nations and applied this crime liberally to foreign nationals whose conduct implicated or interfered with its sovereignty, overseas trade and colonial interests, such as the slave

¹⁷ Rodick, *supra* n 13, at pp.30, 35.

¹⁸ (1817) 2 Dodson’s Admiralty 210, at p.246.

¹⁹ Miller, H., ‘The Caroline’, The Avalon Project, available online: http://avalon.law.yale.edu/19th_century/br-1842d.asp#intro.

trade, and regardless of whether the alleged ‘piracy’ had occurred on the high seas.²⁰ In the 1893 *Behring Fur Seal Arbitration* between the U.S. and Britain, it was argued by Edward J. Phelps on behalf of the U.S. that the general practice of States, including that of Britain and the U.S., as regards the exercise of criminal jurisdiction over foreign nationals on the high seas in time of peace for the protection of national interests was based on the right of self-defence, and the broader grounds of necessity, self-protection and self-preservation.²¹ Other instances, albeit beyond the scope of the present work, include the Ukase of 1821;²² the *Alabama and Kearsage* incident of 1864;²³ and the *Virginius* incident of 1873.²⁴ It is notable that nineteenth century Anglo-American jurists, on the one hand, opposed the validity of protective jurisdiction on the basis that it involved the exercise of extraterritorial jurisdiction in the State’s territorial sovereignty and yet, on the other, seemingly accepted the validity of such jurisdiction (particularly over foreign vessels on the high seas for the protection of the State’s security and customs and revenue interests) under a broad right of self-defence and self-preservation.²⁵ The broad concept of self-defence and the linking of self-defence with protective jurisdiction, for the protection of ‘special’ or ‘vital’ interests, continued to be claimed by some States and commentators well into the twentieth century.²⁶

The right of self-defensive force, however, gradually underwent considerable change and, following the adoption of the U.N. Charter, was confined to circumstances of ‘armed attack’ under Article 51, while the rights of self-preservation and self-protection

²⁰ E.g., Rubin, A.P. (1998). ‘The Law of Piracy’. U.S.: Translational Publishers, Inc., chapter four.

²¹ *Fur Seal Arbitration*, Washington, D.C.: Government Printing Office (1895), vol.IX, pp.130-179 and authorities cited therein.

²² Cited in *Fur-Seal Arbitration*, *ibid.*, vol.I, at pp.66-68.

²³ See Bowett, *supra* n 2, at pp.74-75; Moore, J.B. (1906). ‘Digest of International Law’, vol.II, at pp.723-724; Reuland, R.C.F. (1989). ‘Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag State Jurisdiction’. 22 *Vand.J.Transnat’l.L.* 1161, at p.1211.

²⁴ Hyde, *supra* n 8, at pp.114-115; Moore, *ibid.*, at pp.895-903; Reuland, *ibid.*, at pp.1211-1213; Rodick, *supra* n 12, at pp.37-39; Westlake, *supra* n 2, at pp.171-173; Westlake, J. (1894). ‘Chapters on the Principles of International Law’. Cambridge: CUP, at p.119.

²⁵ *Lotus*, *supra* n 2, at p.69 (Diss. Op. Judge Moore); Westlake (1910), *ibid.*, at pp.171-173; Westlake (1894), *ibid.*, at pp.115-119; Hall, *supra* n 8, at pp.264, 328-330; Hyde, *ibid.*, at pp.106, 114-115, 406-407, 421; Phillimore, *supra* n 10, at p.179; Van Zwanenberg, A. (1961). ‘Interference with Ships on the High Seas’. 10 *ICLQ* 785, at p.793 and authorities cited therein.

²⁶ Bowett, *supra* n 2, at pp.62-65, 71; Brierly, *supra* n 2, at p.257; Brownlie, *supra* n 7, at p.205; Higgins, *supra* n 7, at p.306; Reuland, *supra* n 23, at pp.1206-1208 and note 166 and authorities cited therein; Rodick, *supra* n 13, at p.40; ‘Consultative Meeting of Foreign Ministers of the American Republics’, in 34 *AJIL* 1 (1940), at p.18; Colombos, C.J. (1967). ‘The International Law of the Sea’. London: Longmans, at p.315; Masterson, W.E. (1940). ‘The Hemisphere Zone of Security and the Law’. 26 *A.B.A.J.* 860; Oppenheim, L. (1955). ‘International Law’ (ed. by Lauterpacht, H. London: Longmans, vol.I, at p.319.

were outlawed.²⁷ Article 51 thus codified the right, as a limited exception to the ban on inter-State force, for States to protect, by means of defensive force, their territorial integrity and political independence, as well as their sovereignty and security and certain other of their vital interests, against ‘armed attacks’. The category of vital State interests which may be protected by defensive force, though not unlimited, has been left undefined. Protective jurisdiction, on the other hand, has continued to develop under customary law independently from self-defence but, as will be explained in chapter three, has gone uncoded. It would appear, then, that self-defence and protective jurisdiction are the legal remnants of the once broad rights of ‘self-protection’ and ‘self-preservation’ in classical legal doctrine; both are permitted by international law and are inherent rights of sovereigns and both share the same rationale, namely the need by the State to protect itself and certain of its vital interests from threats emanating from outside the State’s territory. There is some overlap between the vital interests which may be protected by self-defence and protective jurisdiction.²⁸ However, the latter, as a non-forcible measure, is not dependent upon the existence of a link with self-defence or an ‘armed attack’ and accordingly has a potentially broader category of vital interests falling under its ambit, although this too has been left uncoded and undefined.

The protective principle and self-defence are also closely linked philosophically; indeed, both belong to the sphere of preventative justice against future harm. Unlike defensive force, however, protective jurisdiction may be used also to punish past harms, for purposes of retribution or vengeance or deterrence, or as incapacitation. Notwithstanding the fact that self-defence and protective jurisdiction are independent rights under international law, conceptually, protective jurisdiction remains justifiable, perhaps, as a non-forcible measure of self-defence.²⁹

The doctrine of necessity has also been greatly circumscribed and reconceptualised by the ILC’s Draft Articles on State Responsibility from that of a ‘right’ to an ‘excuse’ for internationally wrongful conduct under certain limited circumstances in order to protect

²⁷ Charter of the U.N., San Francisco, 26 June 1945. See also *Corfu Channel Case*, (U.K. v Albania), Merits, Judgement, I.C.J. Reports 1949, p.4, at p.35.

²⁸ Paust, *supra* n 2.

²⁹ See also Cameron, *supra* n 2, at p.46.

the State's 'essential interests'.³⁰ However, the doctrine of necessity, as defined by the ILC, is of relevance only to the enforcement of jurisdiction in the territory or against the flag vessels on the high seas of foreign States and accordingly will not be considered further by the present study. Nonetheless, the theory of necessity remains an important aspect of the protective principle's contemporary rationalisation, as the only non-forcible means available in international law by which a State is permitted *vis-à-vis* its relations with other States to protect its vital interests. Necessity thus excuses what would otherwise constitute an unlawful interference in the territorial sovereignty and internal affairs of other States, a point which will be returned to below. It is perhaps worth noting that the theory of 'functional necessity' provides the modern rationalisation for immunities from jurisdiction, the purpose of which is to facilitate the maintenance of stable international relations by ensuring that persons who enjoy immunity are able to perform functions on behalf of States uninhibited and, more broadly, to ensure respect for the principle of the sovereign equality of States, protect sovereign independence and prevent interference in their internal affairs.³¹ The same considerations may be relevant to protective jurisdiction, which is necessary to enable States to protect their sovereignty and independence and without which they would not be able to maintain a degree of stability and predictability in inter-State relations.

2.3. The Modern Rationale of Protective Jurisdiction

The theory of territorial jurisdiction, as has been already been explained in chapter one, is of fundamental importance and widely adhered to in State practice but it is by no means 'an absolute principle of international law' governing the exercise of the State's prescriptive jurisdiction.³² International law does not normally permit the State to exercise its prescriptive jurisdiction in respect of acts committed by foreign nationals outside its territory; however, customary international law permits exceptions to territoriality based on certain principles of extraterritorial jurisdiction - borne out of the practice of States - the limits of which the State 'should not overstep'.³³ These principles of jurisdiction are supposed to evidence a sufficiently close connection

³⁰ ILCYB, 2001, vol.II (Part Two); A/RES/56/83 (12 December 2001), Article 25. For commentary, see Crawford, J. (2002). 'The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries'. Cambridge: CUP.

³¹ U.N. Doc.A/CN.4/601 (2008), at p.39; U.N. Charter, *supra* n 27, Articles 2(1), 2(4), 2(7); *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, Judgment, I.C.J. Reports 2002, p.3, para.53.

³² *Lotus*, *supra* n 2, at p.20.

³³ *Ibid*, at p.19.

between the legislating State and the alleged offence and, in turn, justify the criminalisation of conduct outside its territory, which would otherwise constitute an unlawful interference in the exclusive territorial sovereignty and internal affairs of other States.³⁴ One such exception to territoriality is protective jurisdiction. The protective principle, as will be explained in chapter three, has varied historical origins and was, by the early nineteenth century, widely established in the practice of States; however, it was not until the first public and private efforts were made to codify extraterritorial criminal jurisdiction during the first half of the twentieth century, first by the League of Nations and more particularly, thereafter, by the Harvard Research, that the nomenclature of 'protective principle' jurisdiction was used and the rationale of this jurisdiction - as distinct from the rights of self-defence and necessity - was given substantive consideration.³⁵ It is therefore useful to examine the rationale of protective jurisdiction by paying particular attention to the perspective of those attempting to codify the international law. The theoretical justification for this jurisdiction is based on three interrelated grounds: (i) the mutually beneficial need by States to protect themselves and certain of their vital interests, a number of which are shared by the international community, from offences emanating outside their territorial borders; (ii) the protection of such interests cannot be left to other States; and (iii) international law does not sufficiently impose an obligation on States to protect each other's vital interests or adequately hold States responsible for the failure to protect such interests from threats and injuries by non-State actors. Each of these grounds will be considered in turn.

³⁴ Ryngaert, *supra* n 2, at pp.31, 35, 144-146; Sixth Committee, Government of the People's Republic of China, Information from and observations by China on the scope and application of the principle of universal jurisdiction, Note submitted to the Office of Legal Affairs pursuant to General Assembly resolution 64/117 of 16 December 2009 (2010), paras.1-2, 8; Mann, F.A. (1964). 'The Doctrine of Jurisdiction in International Law'. 1 *Recueil des Cours* 1, at pp.44-45, 47, 49, 83; O'Keefe, R. (2004). 'Universal Jurisdiction: Clarifying the Basic Concept'. 2 *JICJ* 735, at p.738; Love, V. & Staker, C., 'Jurisdiction', in Evans, M.D. (2010). 'International Law'. Oxford: OUP, at p.320; Shaw, M.N. (2008). 'International Law'. Cambridge: CUP, at p.667.

³⁵ Brierly & De Visscher, *supra* n 2; Harvard Research, *supra* n 2.

2.3.1. The Need to Protect Vital Interests

According to De Visscher, who assisted Brierly, as Rapporteur, during the effort made by the League of Nations to codify ‘criminal competence of States in respect of offences committed outside their territory’, positive law contains two exceptions to the theory of territorial jurisdiction.³⁶ The first of these, suggested De Visscher, is ‘based upon the nature of the interests prejudiced’, which are ‘essential’ to the prescribing State, while the second exception is based on the nationality of the victim and relates to offences committed against nationals.³⁷ De Visscher was of the view that ‘[t]he first exception figures in many legislative systems and has sound reasons to justify it. The second is less generally admitted and is much more disputable.’³⁸ The opinion of De Visscher sufficiently indicates the rationale of protective jurisdiction. It is based solely on the nature of interests that are regarded by the State as ‘essential’, which may be threatened by crimes committed outside the prescribing State’s territory.³⁹

The protection by the State of itself and of certain of its ‘essential’ interests, a term that is often used interchangeably with ‘vital’ or ‘fundamental’ interests,⁴⁰ threats to which may be posed equally by foreign nationals as by the State’s own nationals, has long justified protective jurisdiction.⁴¹ As jurisdiction under this theory is based on the

³⁶ *Ibid.*, at p.253.

³⁷ *Ibid.*, at p.258.

³⁸ *Ibid.*

³⁹ See also *Lotus*, *supra* n 2, at pp.35-36 (Diss. Op. Judge Loder); *ibid.*, at p.100 (Diss. Op. Judge Altamira); *Arrest Warrant*, *supra* n 31, para.16 (Sep. Op. President Guillaume); Bowett, *supra* n 2, at p.62; Cameron, *supra* n 2, at pp.31-32; Harvard Research, *supra* n 2, at p.543; Love, & Staker, *supra* n 34, at p.326; Mann, *supra* n 34, at pp.93-94; Ryngaert, *supra* n 2, at p.96; Shaw, *supra* n 34, at p.667; Council of Europe, European Committee on Crime Problems (1992). ‘Extraterritorial Criminal Jurisdiction’, reprinted in 3 *CLF* 441, at pp.451, 467; Council of the European Union, AU-EU Technical ad hoc Expert Group, ‘Report on the Principle of Universal Jurisdiction’, Final Report (16 April 2009) (Doc.8672/1/09 REV1), Annex, paras.8, 12 (Expert Report); Blakesley, C.L. (1982). ‘United States Jurisdiction over Extraterritorial Crime’. 73 *J.Crim.L.&Criminology* 1109, at pp.1137-1138; Blakesley, C.L., ‘Extraterritorial Jurisdiction’, in Bassiouni, M.C. (ed.) (1999). ‘International Criminal Law’. Ardsley: Transnational, vol.II, at p.54; Bowett, D.W. (1982). ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’. 53 *BYIL* 1 at p.10; IBA, Legal Practice Division, ‘Report of the Task Force on Extraterritorial Jurisdiction’ (28 September 2008), at p.149; Lauterpacht, H. (1947). ‘Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens.’ 9 *CLJ* 330, at pp.343, 348.

⁴⁰ E.g., Council of Europe, *ibid.*, at p.451; Expert Report, *ibid.*; Harvard Research, *ibid.*, at p.552; Lowe & Staker, *ibid.*, at pp.325-326; U.N. Doc.A/61/10 (2006), Annex E, para.20 (ILC Secretariat); U.N. Office on Drugs and Crime, ‘Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments’. New York: U.N. (2006), paras.359, 385.

⁴¹ E.g., *Church v Hubbard*, *supra* n 8, at pp.234-235; Moore, *supra* n 3; Mann, *supra* n 34, at p.39, 93-94; *Le Louis*, (1817) 2 Dodson’s Admiralty 210, at pp.245-246; Brown, P.M. (1940). ‘Protective Jurisdiction’. 34 *AJIL* 112, at p.114; Brown, P.M. (1953). ‘Protective Jurisdiction over Marginal Waters’. 47 *AJIL* 452, at pp.453-454; Dickinson, D.M. (1926). ‘Jurisdiction at the Maritime Frontier’. 40 *Harv.L.Rev.* 1; Garrod, M. (2012). ‘The Development of Protective Principle Jurisdiction over War

protection of vital interests, the place of the offence and the nationality of the accused, or any other connection with the legislating State, are irrelevant.⁴² A matter of great importance, then, as has already been noted elsewhere by Mann, is an assessment of the meaning of vital interests that are capable of falling under the ambit of protective jurisdiction.⁴³ Such an assessment has not, since the Harvard Research, been undertaken and, as will be explained in chapter five, is not straightforward as States have traditionally left undefined in their national laws, or at least with sufficient precision, the interests that they regard as 'vital'. That said, all States have vital interests and it is reasonable to suppose that a number of these may be shared by the international community. The Harvard Research, for example, inferred from State practice the State's security, territorial integrity, political independence and national credit and public documents as shared vital State interests falling under the ambit of the protective principle. It is also illustrated, for example, by the development of protective jurisdiction over war crimes in the aftermath of World War II for the protection of the State's sovereignty, security, independence, nationals and armed forces.⁴⁴ As will be shown in chapter five, contemporary State, treaty and U.N. Security Council practice evinces a core category of shared vital State interests in combatting the threat of international terrorism.

2.3.2. An Exception to the Theory of Territoriality and the Duty of Non-Interference

The protective principle, as a ground of extraterritorial jurisdiction, would appear at first glance to conflict with the theory of territoriality and the customary duty of non-interference in the State's internal affairs, which renders unlawful such legislation as would have the effect of regulating the conduct of foreigners in the territory of other States.⁴⁵ The duty of non-interference is based on customary international law and was codified by Article 2(7) of the U.N. Charter, by which one sovereign is bound to respect

Crimes and the Hollow Concept of Universality'. 12 *ICLR* 763; Garrod, M. (2014). 'Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law'. 25 *Diplomacy&Statecraft* 1; Masterson, W.E. (1927). 'National Jurisdiction in the Marginal Seas over Foreign Smuggling Vessels'. 13 *Problems of Peace and War* 53.

⁴² Harvard Research, *supra* n 2, at p.543; Lauterpacht, *supra* n 39, at p.344; Council of Europe, *supra* n 39, at p.451; *Espionage Prosecution Case*, 94 ILR 69, at p.74; Akehurst, M. (1972-1973). 'Jurisdiction in International Law'. 46 *BYIL* 145, at pp.168-169, 179-180.

⁴³ Mann, *supra* n 34, at p.94, n 184.

⁴⁴ Garrod (2012), *supra* n 41.

⁴⁵ A/RES/2625(XXV) (24 October 1970). See also Bowett, *supra* n 39, at pp.15-16; Mann, *supra* n 34, at pp.30, 47; Beale, J.H. (1923). 'The Jurisdiction of a Sovereign State'. 36 *Harv.L.Rev.* 241.

the rights of all other sovereign powers outside its own territory and is closely related to the principle of sovereign equality. As Article 2(1) of the U.N. Charter makes clear, sovereign equality is one of the fundamental principles of the international legal order.⁴⁶ The principles of sovereign equality and non-interference have to be viewed together with the restriction imposed by international law upon a State that ‘it may not enforce its power in any form in the territory of another’.⁴⁷ That rule follows the basic notion of ‘territorial sovereignty’, which was described by Chief Justice Marshall in the *Schooner Exchange v McFaddon* and later by Judge Huber in the *Island of Palmas* arbitration as the exclusive right of each State to exercise the power of sovereignty over its own territory.⁴⁸ The importance of territorial sovereignty is such that it has been codified in Article 2(4) of the U.N. Charter and has been described in the jurisprudence of the ICJ and the work of the ILC as providing the ‘cornerstone’ and the ‘essential foundation’ of inter-State relations in modern international law.⁴⁹ The importance of territorial sovereignty should not be underestimated; indeed, as will be explained in chapter three, Anglo-American jurists, in support of an exclusively territorial theory of jurisdiction in international law, have traditionally adopted this line of reasoning in order to characterise the exercise of extraterritorial prescriptive jurisdiction in a State’s territorial sovereignty as ‘an invasion of its sovereign rights’ and thus a violation of international law.⁵⁰ It follows from the rule of non-interference that, in order to be permitted by international law to assume jurisdiction, there must exist a sufficiently close connection between the alleged offence and the State imposing criminal liability.⁵¹

On closer inspection, however, protective jurisdiction *per se* does not breach the duty of non-intervention.⁵² Indeed, while the State’s sovereignty is limited to its territory, the concept of jurisdiction, which is governed by international law and is exercised by the State in virtue of its sovereignty, as was made clear by the PCIJ, ‘by no means coincides

⁴⁶ U.N. Charter, *supra* n 27; Bowett, *ibid.*; *R v Jameson* [1896] 2 Q.B. 425, at p.430 (Lord Russell C.J.); *Schooner Exchange McFaddon*, 11 U.S. (7 Cranch) 116 (1812), at p.137.

⁴⁷ *Lotus*, *supra* n 2, at pp.18-19.

⁴⁸ *Schooner Exchange*, *supra* n 46, at p.136; *Church v Hubbard*, *supra* n 8, at p.234; *Island of Palmas (Netherlands v U.S.)*, 4 April 1928, in RIAA, vol.II, U.N. (2006), at pp.838-839.

⁴⁹ U.N. Charter, *supra* n 27; *U.K. v Albania*, *supra* n 27, at p.35; *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, I.C.J. Reports 1986, p.14, para.190; *Armed Activities on the Territory of the Congo (DRC v Uganda)*, Judgment, I.C.J. Reports 2005, p.168, para.148; ILCYB, 1966, vol.II, at p.247.

⁵⁰ E.g., Brierly & De Visscher, *supra* n 2, at p.257.

⁵¹ Mann, *supra* n 34, at p.83.

⁵² *Ibid.*, at pp.93-94; also *Lotus*, *supra* n 2, at p.20; Cameron, *supra* n 2, at p.348; Jennings, R.Y. (1962). ‘The Limits of State Jurisdiction’. 32 *NoTIR* 209, at p.151.

with territorial sovereignty'.⁵³ As was explained by Chief Justice Marshall as early as 1808, '[t]he authority of a nation within its own territory is absolute and exclusive', in respect of the enforcement of jurisdiction; however, in terms of prescriptive jurisdiction, the right of the State under international law to 'secure itself from injury may certainly be exercised beyond the limits of its territory'.⁵⁴ This principle of protection, Marshall explained, is 'universally acknowledged'.⁵⁵ The duty of non-intervention is itself ill-defined and is not absolute and must be weighed against other aspects of sovereignty, not least the equally legitimate right of a State to protect its sovereignty and other vital interests.⁵⁶ Judge Huber alluded to this point in the *Island of Palmas* arbitration, in which he stated that territorial sovereignty has a corollary duty: 'the obligation to protect within the territory the rights of other States'.⁵⁷ It follows that, if the territorial State is incapable or unwilling to fulfil this customary duty, the scope of which is unclear and has been left uncodified, then international law permits the State whose vital interests are threatened to assert jurisdiction under the principle of protection. Of course, in accordance with territorial sovereignty, the prescribing State is not entitled to actually enforce its jurisdiction in the territory of another.⁵⁸

The closeness of the connection between the legislating State and the importance of the interests at issue means that protective jurisdiction is better viewed as a universal and mutually beneficial, albeit limited, exception to territoriality of jurisdiction and the duty to not exercise jurisdiction over foreign nationals outside the State's territory.⁵⁹ This exception to territoriality, which has developed through the consensual practice of States, is permitted by international law in time of armed conflict and during peace as States would otherwise be unable to protect themselves and their vital interests, some of which are safeguarded by international law as part of its role in regulating inter-State relations. As is indicated by numerous treaties, such interests include, for example, the State's sovereignty, security, territorial integrity, political independence, diplomatic personnel and premises and the freedom of trade and navigation on the high seas, and

⁵³ *Lotus*, *ibid.*, at p.20; Jennings, *ibid.*, at pp.212-213; Mann, *supra* n 34, at pp.15-17, 87.

⁵⁴ *Church v Hubbard*, *supra* n 8, at p.234.

⁵⁵ *Ibid.*

⁵⁶ Cameron, *supra* n 2, at p.348.

⁵⁷ *Island of Palmas*, *supra* n 48, at p.839.

⁵⁸ Wharton, F. (1885). 'A Treatise on Criminal Law'. Philadelphia: Kay & Brother, at p.312; *Espionage Prosecution Case*, *supra* n 42, at p.74.

⁵⁹ See also *Fornage* case *supra* n 3, at p.50; *Rodriguez*, *supra* n 7, at p.488; Cameron, *supra* n 2, at pp.348-349; Mann, *supra* n 34, at pp.48, 88, 93-94.

nationals and armed forces during armed conflict.⁶⁰ It would certainly be unreasonable, and perhaps even unusual, if international law safeguarded these vital interests, which appear to be shared by the international community, and did not permit States, in a decentralised legal system, to protect them.⁶¹ A useful illustration of this mutually beneficial right of protection - and one that reflects an important aspect of the origins of protective jurisdiction and dates back to the modern historical development of international law in the sixteenth and seventeenth centuries - is jurisdiction over piracy on the high seas.⁶²

If the protection of vital interests justifies, as a matter of international law, the assertion of prescriptive jurisdiction over crimes occurring within the territorial sovereignty of other States - by evidencing a sufficiently close connection with the legislating State - then it has to be stressed that there is a fundamental distinction to be made in respect of the development of protective jurisdiction over piracy on the high seas. On the high seas, it has not traditionally been necessary, as a matter of international law, for the legislating State to justify the assertion of jurisdiction over piracy by evidencing a prescriptive connection with the alleged offence. The reason for this no nexus requirement, as has already been discussed in chapter one and shown in greater depth by the present author elsewhere, is that the high seas is beyond the exclusive territorial sovereignty of any State and in which all States are equal and independent, and so-called 'pirates' are treated as falling outside the flag protection of any sovereign. The fact that a legislating State is not required by international law to evidence a sufficiently close connection with piracy on the high seas under a particular ground of prescriptive jurisdiction does not mean that States exercised jurisdiction over pirates in the absence of any prescriptive connection at all. Rather, jurisdiction developed over piracy for the mutually beneficial protection by States of certain of their own vital interests, a number of which were shared by the international community, or at least among the maritime powers, not least their sovereignty, security and overseas trade routes and colonial trade and settlements.⁶³

⁶⁰ E.g., U.N. Charter, *supra* n 27, Article 2(4); Convention of the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973, 1035 U.N.T.S. 167, Article 3; U.N. Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 U.N.T.S. 3, Articles 87-90, 105.

⁶¹ See also Mann, *supra* n 34, at pp.93-94.

⁶² Garrod (2014), *supra* n 41.

⁶³ *Ibid.* and chapter three.

Nonetheless, the apparent no nexus requirement in the case of piracy has been described in the early twentieth century by Anglo-American jurists as a theory of ‘universal jurisdiction’. As will be explained in chapter three, these jurists opposed the use of extraterritorial jurisdiction in the territorial sovereignty of States and regarded it as being contrary to international law; and they sought to distinguish jurisdiction over piracy on the high seas, which had prominently developed in the practice of Britain and the U.S., as the only exception to territoriality, by interpreting it as a theory of universality that is permitted only because it is exercised ‘in the interest of all’. This misinterpretation is not merely of historical significance. It had a direct bearing on the public and private efforts made in the first half of the twentieth century to codify jurisdiction in international law. It has also blurred a fundamental conceptual distinction between the development of jurisdiction for the protection of ‘shared vital State interests’ and ‘international community values’.⁶⁴

2.3.3. The Complementarity between Theories of Territoriality and Protection

Anglo-American jurists, in support of an exclusively territorial theory of jurisdiction in international law, have traditionally conceived the protective and territorial principles of jurisdiction as being in irreconcilable conflict with each other. This was the approach, for example, adopted by Brierly in his capacity as Rapporteur during the effort made by the League of Nations to codify protective jurisdiction.⁶⁵ However, these grounds of jurisdiction are not necessarily opposed to each other. Indeed, the vital State interests falling under the ambit of protective jurisdiction would, if a constituent element of an offence committed abroad occurred within the prescribing State’s territory, equally be protected by the theory of objective territoriality.⁶⁶ A perhaps more accurate way to view the relationship between these two theories of jurisdiction is that, as a matter of practicality, protective jurisdiction supplements territoriality which is, in and of itself, ‘entirely inadequate’ over the conduct of foreign nationals abroad.⁶⁷ The limitations of territoriality are illustrated by the reasoning of the U.S. Supreme Court in the case of *Strassheim v Daily*, in which the defendant had committed a fraud against the State of

⁶⁴ Chapters three and five.

⁶⁵ Chapter three.

⁶⁶ Brierly, *supra* n 2, at pp.256-257.

⁶⁷ *Rodriguez*, *supra* n 8; also ILC Secretariat, *supra* n 40, at pp.523-524; Lauterpacht, *supra* n 39, at p.344; Mann, *supra* n 34, at pp.30, 36, 38-40, 87-88, 93-94.

Michigan.⁶⁸ The Supreme Court in that case stated that '[a]cts done outside a [State's territorial] jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power'.⁶⁹ The theory of territoriality thus requires acts outside the legislating State's territory to be 'intended to produce and producing detrimental effects within it'.⁷⁰

The limitations of territoriality subsequently led the American Law Institute and some U.S. courts to misinterpret the reasoning of the Supreme Court *inter alia* as the right under international law for States to assert territorial jurisdiction over conduct that is merely 'intended' to produce an effect in, but has no other connection with, the legislating State's territory. The consequences of such an interpretation, as will be explained in chapter four, are twofold. First, it has the effect of transforming territoriality into a theory of extraterritorial jurisdiction, which is referred to as the so-called 'effects' principle. Second, it confuses the theory of territoriality with that of the protective principle and the latter has been erroneously interpreted by the ILC, some U.S. courts and in legal scholarship as requiring an offence to be directed at or intending to have 'effects' within the prescribing State's territory.

A few years after the case of *Strassheim*, the inadequacy of territoriality was recognised by the Supreme Court in the case of *U.S. v Bowman*, which involved conspiracy to defraud a corporation in which the U.S. Government was the sole stakeholder. The court in that case, while noting that some offences can only be committed within the State's territorial jurisdiction, went on to assert that the U.S. Government had adopted criminal statutes which applied outside the State's territory and were, nevertheless, in conformity with international law. These statutes were, according to the court:

not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents.

The court continued:

⁶⁸ 221 U.S. 281 (1911).

⁶⁹ *Ibid.*, at pp.284-285.

⁷⁰ As was also made clear by the PCIJ in the *Lotus* case.

to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and open a large immunity of frauds as easily committed by citizens on the high seas and in foreign countries as at home.⁷¹

While the facts of that case involved U.S. citizens, the reasoning of the Supreme Court, if taken to its logical conclusion, is not dependent upon the nationality of the offender and inevitably leads to the theory of protective jurisdiction.⁷²

The inadequacy of an exclusive territorial approach to jurisdiction and the idea that theories of territoriality and protection are not fundamentally in conflict with each other were also alluded to by the U.N. Secretary-General in a preparatory survey of subjects of international law for potential codification by the ILC at its First Session. The Secretary-General *inter alia* identified the subject of ‘Jurisdiction with regard to Crimes committed outside National Territory’ as one of fourteen topics in urgent need of codification and suggested that the British House of Lords has ‘declined to recognise the unqualified validity of the rule that in no case can a State assume jurisdiction over an alien for an offence committed abroad [and that] [...] adherence to the strict rules of territoriality may lead to results of some absurdity.’⁷³ The Secretary-General was referring to the case of *Joyce v Director of Public Prosecutions*, in which the Lord Chancellor, delivering the lead judgment, stated that:

It would, I think, be strangely inconsistent with the robust and vigorous common-sense of the common law to suppose that an alien quitting his residence in this country and temporarily on the high seas beyond territorial waters or at some even [more] distant spot now brought within speedy reach and there adhering and giving aid to the King’s enemies could do so with impunity.⁷⁴

The Lord Chancellor, with whom the majority of the House of Lords agreed, recognised and gave effect to the right under international law to exercise extraterritorial jurisdiction under the protective principle.⁷⁵ That said, the Secretary-General suggested that:

⁷¹ *U.S. v Bowman*, 260 U.S. 94 (1922), at pp.97-98,102.

⁷² See also *Pizzarusso*, *supra* n 8, at p.11; *U.S. v Bin Laden*, 92 F.Supp.2d189 (S.D.N.Y., 2000), at p.194.

⁷³ U.N. Doc.A/CN.4/1/Rev.1 (1949), at p.37.

⁷⁴ [1946] A.C. 347, at p.369.

⁷⁵ See also Lauterpacht, *supra* n 39, at pp.342-344.

the question of the jurisdiction of States in the matter of offences committed by aliens abroad is of limited compass, and it is arguable that, in any scheme of codification, it ought to figure merely as a subdivision of a larger topic such as “Obligations and Limitations of Territorial Jurisdiction”.⁷⁶

The Secretary-General was thus of the opinion that the ILC should give priority to the territoriality of jurisdiction by codifying the territorial State’s obligations and, in particular, ‘the general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international law’.⁷⁷ If such obligations were codified, then this would, the Secretary-General assumed, greatly reduce the importance of extraterritorial jurisdiction and the need to codify it. However, contrary to the Secretary-General’s recommendation, the territorial State’s obligations in international law have not been codified; in any case, the assumption by the Secretary-General that the territorial State would be willing and capable of adequately protecting the vital interests of other States is not sufficiently reliable. It is to this point that the chapter will now turn.

2.3.4. The Protection of Vital Interests by other States

The rationale of protective jurisdiction is based on two further, interrelated grounds. The first of these was explained by De Visscher. The ‘sound reasons’ that justify protective jurisdiction, as an exception to territoriality, according to De Visscher, are that, firstly, in the case of offences directed at the State’s essential interests, ‘it is hard to conceive of any law competent to repress them other than that of the State which is menaced.’⁷⁸ The repression of such offences, suggested De Visscher, in most cases ‘is of no interest to the State on whose territory the acts are committed; it may even happen that the consequences deriving from them are a cause of profit to it.’⁷⁹ De Visscher was of the view that ‘[i]n any case, a State cannot abandon to another the task of dealing with and punishing acts susceptible of causing injury to its essential interests.’⁸⁰ The same justification for this jurisdiction was also explained by the Harvard Research, which suggested that the protective principle exists due to the ‘inadequacy’ of national legislation and political unwillingness for the protection of the ‘security, integrity and

⁷⁶ *Supra* n 73, at p.37.

⁷⁷ *Ibid.*, at p.34.

⁷⁸ Brierly & De Visscher, *supra* n 2, at pp.255, 258.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

independence of foreign States'.⁸¹ Thus, for the Harvard Research, '[s]o long as the State within whose territory such offences are committed fails to take adequate measures, competence must be conceded to the State whose fundamental interests are threatened.'⁸²

Protective jurisdiction is thus justified on the ground that States may be either unwilling or incapable of protecting each other's vital interests, or doing so to the extent that is viewed adequate, from within their territorial sovereignty.⁸³ The need for the 'self-defence' or 'self-protection' of overseas trade and trade routes, and the fact that other States are unwilling or incapable of protecting such interests, and in some cases allow their territories to be used by so-called 'land pirates', in which such persons operate with impunity, is precisely the reason why protective jurisdiction and the right of every State to exercise such jurisdiction has traditionally developed over piracy on the high seas.⁸⁴ The reason why protective jurisdiction developed in the aftermath of World Wars I and II was based on the need of injured belligerents to punish violations of the law of war, who were well aware that the enemy could not be entrusted to fulfil its obligations under international law, by prosecuting breaches of the law of war by their own armed forces and civilians.⁸⁵ A more recent illustration of this point is the threat to vital interests by international terrorism. There is no definition of 'terrorism' in international law and national laws define 'terrorism' and related offences in radically different ways. Likewise, groups designated as 'terrorist' by some States may not be treated as such by others.⁸⁶ This means that the State's vital interests may well go inadequately protected. In the light of this complex reality, there has since the 1960s been a proliferation of counter-terrorism treaties that provide for the obligation to extradite or prosecute. This obligation, as will be explained in chapter five, requires

⁸¹ Harvard Research, *supra* n 2, at pp.552-553, 561.

⁸² *Ibid.*, at p.552.

⁸³ Council of Europe, *supra* n 39, at p.451; Bowett, *supra* n 2, at p.64; Cameron, *supra* n 2, at p.31; Lauterpacht, *supra* n 39, at pp.347-348; Ryngaert, *supra* n 2, at p.96; Shaw, *supra* n 34, at p.667; *Italian South Tyrol Terrorism Case (No 2)* 71 ILR 243; Bantekas, I. & Nash, S. (2007). 'International Criminal Law'. Abingdon: Routledge-Cavendish, at p.83; Blakesley, C.L., 'Jurisdictional Issues & Conflicts of Jurisdiction', in Bassiouni, M.C. (ed.) (1988). 'Legal Responses to International Terrorism: U.S. Procedural Aspects'. The Netherlands: Martinus Nijhoff, at p.168; Garcia-Mora, M.R. (1958). 'Criminal Jurisdiction over Foreigners for Treason and Offences Against the State Committed upon Foreign Territory'. 19 *U.Pitt.L.Rev.* 567, at p.587.

⁸⁴ Garrod (2014), *supra* n 41, at pp.200-202; also *supra* n 21, at pp.141-141; *ibid.*, vol.XIII, at pp.302-304.

⁸⁵ Garrod (2012), *supra* n 41, at pp. 798, 804.

⁸⁶ See also chapter one.

States parties to protect certain of the vital interests of each other by initiating criminal proceedings against alleged offenders found in their territory, failing extradition. These treaties do not define ‘terrorism’ but, rather, require States parties to criminalise specific conduct as ordinary crimes. In any case, the ‘ungoverned spaces’ in which terrorists are able to operate and plan external attacks against other States means that the implementation of treaty obligations may be ineffective.⁸⁷ Beyond these treaty arrangements, however, a detailed empirical analysis of national laws shows that States do not generally criminalise conduct that implicates the vital interests of other States.⁸⁸

The protection by the State of its vital interests is therefore a matter of necessity; States have no option but to assert, unilaterally, jurisdiction over offences which are capable of threatening or implicating their vital interests.⁸⁹ It is perhaps worth noting, by way of aside, that jurisdiction based on the protective principle would appear to function in a similar way to the jurisdiction of the International Criminal Court (ICC), which is ‘complementary’ to the jurisdiction of the *lex loci*.⁹⁰ Thus, the protective principle, as with the ICC, fills a jurisdictional gap where the *lex loci* is unwilling or incapable of undertaking a ‘genuine’ prosecution.⁹¹

2.3.5. The Imposition of International Legal Obligations

The third justification of protective jurisdiction, first noted by the Harvard Research, is that international law does not sufficiently impose an obligation on States to protect the fundamental interests of foreign States from the conduct of private actors within their territorial boundaries.⁹² The ILC’s Draft Articles on State Responsibility, which were not adopted by the U.N. General Assembly until 2001, thus bringing to an end nearly fifty years of ILC work on the subject, are defined in narrow terms and States are not, as a general rule, responsible under international law for the failure to prevent and punish the activities of private actors for breaches of international law which threaten or injure

⁸⁷ See also HC, Home Affairs Committee - Seventeenth Report, Counter-terrorism, 30 April 2014, paras.2, 4, 40, 42, 52.

⁸⁸ Chapter four.

⁸⁹ Cameron, *supra* n 2, at p.45.

⁹⁰ Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S. 3, Preamble & Article 1.

⁹¹ *Ibid.*, Article 17.

⁹² Harvard Research, *supra* n 2, at pp.552-553, 561; also Lauterpacht, H. (1928). 22 *AJIL* 105, at p.126.

the vital interests of foreign States.⁹³ As a limited exception, a State may be held responsible for an ‘internationally wrongful act’ where the conduct of private actors breaches an ‘international obligation’ and is ‘attributable’ to that State, namely ‘if the individual or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct’.⁹⁴ The level of control which must be exercised by the State in order for the conduct of private actors to be attributable to that State, as has been reaffirmed by the ICJ, is one of ‘effective control’ in respect of each operation in which the alleged violations occurred.⁹⁵ The exercise of ‘general control’ by the State over private actors, even ‘with a high degree of dependency on it’, would not, without further evidence, be sufficient to give rise to State responsibility in international law.⁹⁶ The rules on State responsibility may be preferable to the exercise of protective jurisdiction, in cases where States are involved in the perpetration of a crime against another State.⁹⁷ However, the complexity of State attribution and the requirement of a high threshold for the test of control and the burden of establishing satisfactory evidence of State involvement, which must be proved by evidence that is ‘fully conclusive’,⁹⁸ means that State attribution may be rare.⁹⁹ In any case, the rules on State responsibility are limited to breaches of ‘international obligations’ and this means that many of the offences potentially covered by protective jurisdiction may fall outside such rules.

A further issue raised by international law and non-State actors arises where the territorial State merely tolerates or is complicit in the activities of private actors either operating in its own territory or that of a third State.¹⁰⁰ A useful illustration of this historically is the *Caroline* incident, discussed above, in which the British Government claimed that private armed groups had been ‘permitted’ to arm and organise themselves

⁹³ A/RES/56/83, *supra* n 30.

⁹⁴ *Ibid.*, Article 8.

⁹⁵ *Nicaragua*, *supra* n 49, para.115; *Application of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p.43, para.400.

⁹⁶ *Nicaragua*, *ibid.*, paras.109-115; *Bosnia v Serbia*, *ibid.*

⁹⁷ Ryngaert, *supra* n 2, at pp.97-98.

⁹⁸ *Bosnia v Serbia*, *supra* n 95, para.209; *U.K. v Albania*, *supra* n 27, at pp.17-18.

⁹⁹ See also *DRC v Uganda*, *supra* n 49, para.146; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, p.70.

¹⁰⁰ See Brownlie, I. (1958). ‘International Law and the Activities of Armed Bands’. 7 *ICLQ* 712, at pp.734-735; Brownlie, I. (1961). ‘The Use of Force in Self-Defence’. 37 *BYIL* 183, at p.255.

within the territory of the U.S.¹⁰¹ The obligation to extradite or prosecute, a principle contained in more than sixty treaties since 1970, requires the State in whose territory the accused is present, to extradite the accused to another party or, failing extradition, to initiate criminal proceedings on the latter's behalf.¹⁰² However, this obligation is limited to treaty regimes and to specific offences; it has also given rise to serious limitations in circumstances where an alleged offence is sponsored by the custodial State.¹⁰³ Nor does international law impose a general duty on States to criminalise or actively prosecute or assist in surrendering those individuals who have committed acts threatening or injuring the vital interests of other States. It is in the light of these legal and practical realities that Bowett has argued that:

It is as a result of the failure of international law to contain duties relating to the conduct of individuals which threatens the security and political independence of states that states impose penalties under their own municipal law as a protection against such conduct and thereby assume a somewhat extensive jurisdiction ...¹⁰⁴

The argument by Bowett would appear to be unobjectionable. Garcia-Mora is often cited in legal scholarship as the main opponent of the protective principle, due to what Garcia-Mora perceived as the potential abuse, and unjust and politically motivated prosecutions, that could arise under the principle. However, Garcia-Mora ultimately recognised that the strength of his own argument was dependent upon the 'solidarity of the World Community, which imperatively demands the suppression within each nation's territory of activities endangering the peace and security of States.'¹⁰⁵ The problem with this view, he suggested, is that it would require 'an overhaul of the basic principles upon which the international community has thus far rested.'¹⁰⁶ It is fair to say that Garcia-Mora's conception of international society is still found wanting, which is perhaps illustrated no clearer than within the context of the complex nature of international terrorism.

¹⁰¹ *Supra* n 19.

¹⁰² See chapter five.

¹⁰³ E.g., *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Provisional Measures, I.C.J. Reports 1992, p.3.

¹⁰⁴ Bowett, *supra* n 1, at pp.60-61.

¹⁰⁵ Garcia-Mora, *supra* n 83.

¹⁰⁶ *Ibid.*, at p.588.

2.3.6. The Threat of International Terrorism

While States are the major actors in the international community and the international legal system, the emergence of international terrorism shows that the State is not the only cause of injurious acts to other States. This is illustrated most vividly, perhaps, by the ‘large-scale offensive’ and ‘control of territory in parts of Iraq and Syria’ by the ISIL and ANF.¹⁰⁷ The unwillingness or inability of States to protect each other’s vital interests from the activities of private actors within their territory, and the limited nature of State attribution under the rules on State responsibility, is of particular importance in respect of diffuse, transnational terrorist networks, which have a large degree of independence and are dispersed across multiple countries, while often maintaining loose, complex relationships with governments.¹⁰⁸ In recognition of this situation, the U.N. General Assembly has adopted, since the 1970s, several resolutions which, though not defining ‘terrorism’, have urged States to refrain from organising and assisting, or from acquiescing in or encouraging acts of terrorism within their territories that are directed against other States.¹⁰⁹ These provisions are, according to the ICJ, declaratory of customary international law; that said, they are limited to acts reaching the threshold of ‘a threat or use of force’ under the law governing self-defence.¹¹⁰ This high threshold is not the case in respect of the more recent legally binding resolutions adopted by the Security Council, acting under Chapter VII of the U.N. Charter, requiring States to prevent and refrain from providing support to and acquiescing in acts terrorism against other States.¹¹¹ However, these resolutions do not define key concepts, including ‘terrorism’ and ‘terrorist acts’.¹¹² It is notable that, even in circumstances where international law imposes a duty to provide ‘special protection’ to the vital interests of foreign States, for example, diplomatic personnel and premises, the territorial State may be prepared to sponsor or acquiesce in acts of terrorism against those interests.¹¹³ In response to the bombing of U.S. embassies in Kenya and Tanzania, the Security Council, acting under Chapter VII, strongly condemned the Taliban for allowing

¹⁰⁷ S/RES/2169 (30 July 2014), preambular para.4.

¹⁰⁸ See Becker, T. (2006). ‘Terrorism and the State: Rethinking the Rules of State Responsibility’. Oxford: Hart.

¹⁰⁹ A/RES/2625(XXV) (24 October 1970); A/RES/2131 (21 December 1965); A/RES/3314(XXIX) (14 December 1974); A/RES/40/61 (9 December 1985); A/RES/42/22 (18 November 1987); A/RES/49/60 (9 December 1994); A/RES/51/210 (17 December 1996).

¹¹⁰ *DRC v Uganda*, *supra* n 49, para.162 ; U.N. Doc.A/C.6/65/L.10 (3 November 2010), para.i.

¹¹¹ S/RES/1189 (13 August 1998); S/RES/1368 (12 September 2001); S/RES/1373 (28 September 2001).

¹¹² See chapter four.

¹¹³ *U.S. Diplomatic and Consular Staff in Tehran (U.S. v Iran)*, Judgment, I.C.J. Reports 1980, p.3.

Afghanistan to be used as a safe haven for the training, planning and preparation of 'terrorist acts against other States or their citizens'.¹¹⁴ State involvement in acts of terrorism is illustrated, most notably, by the Libyan Governments involvement in the Lockerbie incident and, more recently, by the alleged involvement of the Syrian Government in the assassination of the President of Lebanon and 22 others and the alleged involvement of the Russian Government in acts of terrorism in Ukraine.¹¹⁵ States accused of sponsoring or shielding terrorists from prosecution has led to, and continues to dominate, the negotiations by the Ad Hoc Committee on Terrorism of a draft Comprehensive Convention on International Terrorism.¹¹⁶

These issues are underscored by the terrorist attacks on the Twin Towers, in New York, and the Pentagon, in Washington, on 11 September 2001 and, in response, the U.S.-led invasion of Afghanistan, which had been determined by the U.S. and U.K. to be harbouring al Qaeda.¹¹⁷ The invasion of Afghanistan has precipitated considerable recent literature as to whether and under what conditions international law permits self-defensive force against non-State terrorist actors operating in the territory of foreign States in order to protect their vital interests.¹¹⁸ The same point applies *mutatis mutandis* to the practice of targeted killing. Given that forceful measures may be permissible only in very narrow circumstances, and that international terrorism is being combated primarily under a criminal law paradigm,¹¹⁹ the protective principle of jurisdiction, in the words of the Harvard Research, is 'indispensable' and must 'remain the principal defence' of vital interests.¹²⁰

¹¹⁴ S/RES/1267 (15 October 1999).

¹¹⁵ See chapter six.

¹¹⁶ U.N. Doc.A/54/301 (3 September 1999), para.10; U.N. Doc.A/64/37 (2009), Annex II, para.4; U.N. Doc.A/66/37 (2011), Annex I, paras.10 &18.

¹¹⁷ The U.S. and U.K. did not establish evidence of the international responsibility of the Taliban for the terrorist attacks by al-Qaeda on 11 September 2001. See Letter dated 7 October 2001 from the Permanent Representative of the U.S. to the U.N. addressed to the President of the Security Council, U.N. Doc.S/2001/946 (2001).

¹¹⁸ Greenwood, C. (2002). 'International law and the war against terrorism'. 78 *International Affairs* 301; Jinks, D. (2003). 'State Responsibility for the Acts of Private Armed Groups'. 4 *Chinese ILJ* 83; Tams, J.C. (2009). 'The Use of Force Against Terrorists'. 20 *EJIL* 359; Trapp, N.K. (2010). 'The Use of Force Against Terrorists: A Reply to Christian J. Tams'. 20 *EJIL* 1049.

¹¹⁹ Samuel, H.L.K. & White, N.D. & De Friás, S.M. (eds.) (2012). 'Report of Key Findings and Recommendations on the Rule of Law and Counter-Terrorism'. Multi-National Counter-Terrorism Expert Network, at pp.2, 10.

¹²⁰ Harvard Research, *supra* n 2, at pp.553, 561.

2.4. Concluding Remarks

The purpose of this chapter has been to explain the contemporary rationalisation of protective jurisdiction and the interests that it serves. The protective principle is the only recognised ground of extraterritorial jurisdiction in international law over offences occurring wholly outside the State's territory, including inchoate and preparatory offences, which threaten vital State interests, as well as those interests which are located abroad, and where no constituent element of an offence or other tangible effect has actually been felt within the proscribing State's territory. This distinguishes protective jurisdiction from the territorial and so-called 'effects' principles.¹²¹ As jurisdiction under this theory is based on the protection of vital interests, the place of the offence and the nationality of the accused, or any other connection with the legislating State, are irrelevant. The principle applies equally in time of war as it does during peace. The protective principle, as has been explained, provides an exception to the theory of territorial jurisdiction but may also be viewed as complementary with territoriality which would, in and of itself, be wholly inadequate for dealing with offences occurring outside the State's territory.

The theoretical justification for protective jurisdiction, as has been explained, is based on three interrelated grounds. The first of these is the need by States to protect themselves and certain of their vital interests, a number of which are shared by the international community, from offences emanating outside their territorial borders. The two other grounds are, first of all, that the protection of vital interests cannot be left to other States and, secondly, international law does not sufficiently impose an obligation on States to protect each other's interests or adequately hold States responsible for the failure to protect such interests from threats and injuries by non-State actors. This rationale would suggest that protective jurisdiction is based on the theory of necessity and the absence of any other means, in a decentralised international legal system, to protect vital State interests from crimes occurring outside national territory. The perpetrators of such crimes would otherwise escape with impunity. It is precisely for this reason that protective jurisdiction has, for example, traditionally developed over

¹²¹ See *Bin Laden*, *supra* n 72, at pp.219-220; *Pizzarusso*, *supra* n 8, at pp.10-11; *U.S. v Cardales* 168 F.3d548 (1st Cir., 1999); *U.S. v Gonzalez*, 311 F.3d440 (1st Cir., 2002); ALI, Restatement (Second) of Foreign Relations Law of the U.S. (1965), Comment c; Blakesley, *supra* n 83, at pp.163-164; Blakesley (1999), *supra* n 39, at p.55.

piracy and war crimes.¹²² The protective principle, the scope of which is limited to the protection of certain vital interests, also provides for a degree of stability and predictability in inter-State relations. Also of relevance to the rationale of this jurisdiction is reciprocity. Indeed, all States have vital interests and protective jurisdiction provides States with a mutually beneficial right by which to protect such interests in time of peace and during armed conflict.

The protection of vital interests evidences a sufficiently close connection in order to justify, as a matter of international law, the criminalisation of conduct in the territorial sovereignty of other States and excuses what would otherwise constitute an unlawful interference in the latter's sovereignty and internal affairs. In the case of piracy on the high seas, on the other hand, an offence falling outside the territorial sovereignty and flag protection of all States, the need to evidence such a connection is not required by international law. This distinction is one of great importance. The no nexus requirement in the latter case has been described in the early twentieth century by Anglo-American jurists as a theory of 'universal jurisdiction'. These jurists opposed the use of extraterritorial jurisdiction in the territorial sovereignty of States and they sought to distinguish jurisdiction over piracy on the high seas, as the only exception to the theory of territoriality, by interpreting it as a theory of universality. As has been explained, however, the fact that States do not need to evidence a prescriptive connection over piracy on the high seas does not mean that States exercised jurisdiction over pirates in the absence of such a connection. The no nexus requirement does not transform jurisdiction over piracy into a theory of universality. Rather, jurisdiction developed for the protection of vital State interests, a number of which were shared by the international community, or at least among the maritime powers. It is thus inappropriate and even misleading to refer to the no nexus requirement over piracy as 'universal jurisdiction'. Nonetheless, the views of these jurists had a profound influence on the public and private efforts in first half of twentieth century to codify protective jurisdiction. This is explored in further depth in the proceeding chapter.

It will be recalled that the Secretary-General, above, proposed in 1949 that protective jurisdiction is of 'limited compass' and that the ILC in its codification of topics of international law should focus on the territorial State's obligations to prevent crimes

¹²² Garrod (2012), *supra* n 41, at pp.798, 806; Garrod (2014), *supra* n 41.

being committed in their territory against other States. If such obligations were codified, then this would, the Secretary-General assumed, greatly reduce the importance of extraterritorial jurisdiction and the need to codify it. It is fair to say that, even if the opinion of the Secretary-General was accurate in 1949, it does not reflect accurately the developments in transnational crimes that have subsequently occurred since that time, most notably international terrorism. The territorial theory of jurisdiction, as has been shown, is wholly inadequate for responding to international terrorism.

The rationale of protective jurisdiction, which does not require a connection with an alleged offence to be established, other than where the offence implicates or threatens vital interests, is of great importance for combatting transnational crimes, including the problem of international terrorism. The reason why this is so is twofold: first of all, international terrorism poses one of the most serious threats to States and certain of their vital interests, including where such interests are located abroad.¹²³ Secondly, this threat is increasingly sophisticated and complex, with diffuse networks and cells (in particular by the use of the Internet) operating, planning, financing, preparing and launching acts of terrorism across numerous States. While some of these networks operate autonomously and have a large degree of independence, others have close and complex relationships with States or operate in ungoverned spaces and fall outside the rules of State responsibility. The radically different ways in which States define ‘terrorism’ and the absence of a definition of it in international law means that the ‘terrorist’ groups of one State will continue in some circumstances to be the freedom fighters of others.¹²⁴ The upshot of all this is that it would, at best, be inappropriate and, at worst, naïve, to rely wholly on the territorial State to protect the vital interests of other States. Given the relative power of some terrorist groups to that of States and the ability of such groups to overpower States, and the determination by the Security Council that the threat is ‘growing’,¹²⁵ the time is ripe to consider whether protective jurisdiction could be more effectively utilised by States and strengthen the existing international legal framework by clarifying what this jurisdiction is and subjecting it to codification. Before doing so, however, it is important first to examine the extent to which protective jurisdiction has been used in contemporary State and treaty practice in response to international

¹²³ Chapter one.

¹²⁴ See also chapters one and six.

¹²⁵ Chapter six.

terrorism. The key findings of an empirical study into State practice are presented in chapter four, while the types of vital interests that have been included under the ambit of this jurisdiction are examined in chapter five.

Chapter Three

‘The Modern Development of and Early Efforts to Codify Protective Principle Jurisdiction’

3.1. Introduction

The ‘origins’ of protective jurisdiction are little understood and the tracing of its development is problematic. One of the main reasons why this is so is because it is a theory of jurisdiction to prescribe, and the nomenclature ‘protective principle’ and a definition of it, did not materialise until the publication of a Draft Convention on jurisdiction by the Harvard Research on International Law in 1935.¹ The purpose of this chapter is to shed important light on the modern development of protective jurisdiction, in particular during the nineteenth century, and to examine the various public and private efforts made to codify this jurisdiction in the first half of the twentieth century.

One of the most important aspects of the modern development of protective jurisdiction that this chapter will consider is Article 7 of the French Code of Criminal Procedure of 1808.² The protective principle of jurisdiction, as exemplified by Article 7, was, by the mid-nineteenth century, replicated in the national laws of the majority of other States and used to protect certain vital interests, including the State’s ‘internal’ and ‘external’ security, sovereignty, political independence, territorial integrity, Head of State and public officials and currency and official documents. These vital State interests appear to have been shared by the international community and, as explained in chapter one, are referred to in this study as ‘shared vital State interests’.

Notwithstanding Article 7 *inter alia*, protective jurisdiction has a longer and more varied history than is generally appreciated. One of the most important of these is the development of protective jurisdiction over ‘piracy’ on the high seas, roughly between the seventeenth and nineteenth centuries, for the protection of certain shared vital State interests, for example, the State’s sovereignty, independence, security, the sovereign right to navigate the high seas and overseas trade routes and colonial trade and

¹ Harvard Research, *infra* n 116.

² Moore, J.B. (1887). ‘Report on Extraterritorial Crime and the Cutting Case’. Washington, D.C.: U.S. Department of State, Government Printing Office; Cameron, C. (1994). ‘The Protective Principle of International Criminal Jurisdiction’. Aldershot: Dartmouth, at pp.34-35.

settlements.³ Another important aspect of the development of protective jurisdiction, which has its roots in the early history of modern international law, since the sixteenth century, and was widely used in the aftermath of World War II, has occurred in respect of violations of the laws and customs of war.⁴ The present author has published on the development of protective jurisdiction over piracy and war crimes elsewhere and the present chapter is confined to noting a summary of the findings.⁵

A greater understanding of the way in which protective jurisdiction has traditionally developed is of great importance for, as will be explained, grounds of extraterritorial jurisdiction have traditionally been little understood and, more often than not, subject to considerable confusion. An important source of this confusion was the divergence that has traditionally existed between the so-called Anglo-American and Continental schools of thought in international law.⁶ Anglo-American jurists regarded protective jurisdiction, which was widely recognised by States as the only exception to the territoriality of jurisdiction, as being contrary to international law because it involved the exercise of extraterritorial jurisdiction in another State's territorial sovereignty and internal affairs; and they assumed that Anglo-American States, in particular Britain and the U.S., adhered to a strict territorial approach to jurisdiction.

One of the most influential of these jurists was J.B. Moore, whose academic commentary was later repeated by Moore in his Dissenting Opinion while serving as the first U.S. Judge before the Permanent Court of International Justice (PCIJ) in the *Lotus* case.⁷ In an effort to show that protective jurisdiction violated international law, Moore distinguished between extraterritorial jurisdiction over piracy on the high seas, which had developed prominently in the practice of Britain and the U.S., from extraterritorial jurisdiction in general international law over crimes, other than piracy, occurring in another State's territorial sovereignty. Moore went one step further and elaborated an

³ Garrod, M. (2014). 'Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law'. 25 *Diplomacy&Statecraft* 195.

⁴ Garrod, M. (2012). 'The Development of Protective Principle Jurisdiction over War Crimes and the Hollow Concept of Universality'. 12 *ICLR* 763.

⁵ *Ibid.*; *supra* n 3.

⁶ Lauterpacht, H. (1931). 'The So-Called Anglo-American and Continental Schools of Thought in International Law'. 12 *BYIL* 31, at p.33; Scott, J.B. (1932). 'The Two Institutes of International Law'. 26 *AJIL* 87, at p.89.

⁷ Moore, J.B. (1906). 'Digest of International Law'. Washington, D.C., vol.II; *Case of the S.S. "Lotus" (France v Turkey)*, Judgment, PCIJ Reports 1927, Series A, No.10, at p.70 (Diss. Op. Judge Moore).

entirely new ground of jurisdiction over piracy and called it ‘universal jurisdiction’.⁸ To that end, Moore suggested that this ground of jurisdiction, as the only exception to territoriality, is confined to ‘piracy by the law of nations’ and, as such, is restricted to the high seas and is exercised ‘in the interest of all’.⁹ Yet Moore based this opinion on little more than his own, earlier, academic commentary and the commentaries of other Anglo-American jurists, none of which provided any evidence, by way of State practice, to support a theory of universal jurisdiction over piracy under the law of nations either. As will be explained, the consequence of this is that Moore confused the development and applicability of protective jurisdiction over piracy for the protection of shared vital State interests with what Moore called ‘universal jurisdiction’. The opinion of Moore had a profound influence on the various efforts made to codify extraterritorial jurisdiction during the first half of the twentieth century.

The League of Nations decided not to include protective jurisdiction in its list of topics as ‘ripe’ for codification ‘at the present moment’, based on the recommendation by Brierly, acting as Rapporteur. The opinion of Brierly reflected that of Moore and he dismissed the codification of protective jurisdiction based on the assumption that Britain and the U.S. adhered to a strictly territorial approach and that the possibility of any agreement on an international convention would ‘demand sacrifices’. At the same time, Brierly summarily dismissed jurisdiction over piracy on the high seas as having ‘little in common’ with protective jurisdiction.¹⁰ The Harvard Research, which was established with the anticipation that its research would be of interest to the League, is notable as the first study to systematise theories relating to grounds of jurisdiction under customary international law, including the ‘protective principle’, and define them in a Draft Convention. The Harvard Research defined protective jurisdiction based on a narrow category of vital interests - security, territorial integrity and political independence - with the aim of bridging the supposed divergence identified by Brierly *inter alia* between Britain and the U.S., on the one hand, and the majority of other States, on the other. However, the Harvard Research followed the same approach as Brierly and dealt with piracy in a separate draft article and codified, *lex ferenda*, the theory of ‘universal jurisdiction’ over a crime of ‘piracy by the law of nations’ defined

⁸ *Lotus*, *ibid.*, at pp.69-71.

⁹ *Ibid.*

¹⁰ *Infra* n 75, at p.253.

by Moore.¹¹

The International Law Commission (ILC), at its First Session in 1949, identified protective jurisdiction as one of fourteen topics in urgent need of codification based on preparatory work by the U.N. Secretary-General.¹² The Secretary-General recommended that this jurisdiction is of a ‘controversial nature’ and ‘limited compass’ and that the ILC may wish to prioritise other topics.¹³ The work by the Secretary-General was based almost exclusively on a review of Brierly and the Harvard Research and no consideration was given to the development of protective jurisdiction in State practice, in particular the development of this jurisdiction over piracy and in widespread State practice over war crimes in the aftermath of World War II. The ILC ultimately decided to adopt, based on a recommendation by the Secretary-General, a fragmented approach and prioritised the codification of other topics. One of these was jurisdiction over piracy under the special legal regime governing the high seas. The ILC, in the codification of this latter topic, relied exclusively on the Harvard Research; at the same time, the ILC did not give any consideration to theories relating to grounds of jurisdiction under custom or specify which of these grounds, if any, it intended to codify. The ILC also considered whether the ‘laws of war’ should be selected as a topic for codification but the majority of the ILC declared itself opposed to the study of this topic at that time. The ILC thus missed an important opportunity to clarify and codify the scope and application of the protective jurisdiction under custom, in particular over piracy and war crimes.

The chapter concludes that protective jurisdiction has developed over crimes under domestic and international law for the protection of a range of shared vital State interests. However, this jurisdiction has not been codified by the ILC, let alone debated and the views of governments exchanged. Nor has the development and applicability of this jurisdiction over piracy and war crimes been examined by the ILC. The absence of an instrument codifying grounds of jurisdiction has resulted in protective jurisdiction being perceived to be highly controversial and interpreted in narrow terms (confined to domestic crimes) by courts and in legal scholarship. It has also given rise to a collective

¹¹ *Infra* n 116.

¹² *Infra* n 151, at pp.279-281.

¹³ U.N. Doc.A/GN.4/1/Rev.1, *infra* n 62.

belief, discussed in chapter one, which has developed out of haphazard analyses of State practice and the overreliance on tentative, secondary sources of evidence of customary international law. This belief posits that a theory of universal jurisdiction has for the past 500 years developed as a customary rule over piracy in order to protect ‘international community values’, as they will be referred to in the present study, and that this ground of jurisdiction was codified by the ILC; moreover, the protection of such values on the basis of this theory expanded in the aftermath of World War II from piracy to encompass war crimes and other crimes under international law. The codification of protective jurisdiction and the clarification of its relationship with other grounds of jurisdiction are thus necessary and desirable more than ever before.

The chapter begins, in part one, by examining Article 7 of the French Code of Criminal Procedure of 1808, which served as the prevalent model for the drafting of criminal codes both within and outside of Europe and appears to have been regarded by many States as the only exception to the theories of territoriality and nationality jurisdiction under customary international law. That said, the national laws of some States expanded protective jurisdiction, without any apparent qualification, to include minor offences committed abroad against the prescribing State’s nationals. This conflated protective jurisdiction *stricto sensu* with the more controversial ‘passive personality’ principle of jurisdiction, as it subsequently came to be defined by the Harvard Research. The latter point is illustrated, rather effectively, by a diplomatic controversy which arose between the U.S. and Mexico in the *Cutting* incident of 1886 and by the decision of the PCIJ in 1927, in the *Lotus* case, which arose out of a dispute between France and Turkey.¹⁴ Part two of the chapter analyses the *Lotus* case, the first and only case in which an international court has directly addressed grounds of jurisdiction under customary international law.¹⁵ While the PCIJ in that case affirmed the validity of protective jurisdiction, the judgment and the Dissenting Opinions illustrate that the judges serving on the PCIJ had a limited understanding of theories relating to grounds of jurisdiction under customary international law and of the protective principle in particular.¹⁶ The decision of the PCIJ in the *Lotus* case and these judicial statements thus serve as, at best, questionable and, at worst, misleading, guides to one of international law’s more

¹⁴ *Lotus*, *supra* n 7.

¹⁵ *Cf. Arrest Warrant of 11 April 2000 (DRC v Belgium)*, Judgment, I.C.J. Reports 2002, p.3, at p.35 (Sep. Op. President Guillaume); *ibid.*, at p.63 (J. Sep. Op. Judges Higgins *et al.*).

¹⁶ *Cf. Lotus*, *supra* n 7, at pp.35-36 (Diss. Op. Judge Loder); *ibid.*, at p.100 (Diss. Op. Judge Altamira).

controversial topics. The final part of the chapter, part three, analyses the public and private efforts made to codify the protective jurisdiction in the first half of the twentieth century.

3.2. The ‘Modern’ Historical Development of Protective Jurisdiction

The theory of ‘protection’, as a ground of extraterritorial jurisdiction in international law, it has to be stressed from the outset, was not defined until 1935 by the Harvard Research, although such jurisdiction has historically developed in State practice and is governed by customary international law. This makes the examination of this jurisdiction and the tracing of its development rather problematic and therefore it is little understood by courts and in legal scholarship. That said, the ‘modern’ historical development of protective jurisdiction is often traced to the Napoleonic era and the French Code of Criminal Procedure of 1808, Article 7.¹⁷ Article 7 applied to offences committed by foreign nationals abroad against the State’s security. According to Moore, the Assistant Secretary of State for the U.S. Government, as well as a member of the Permanent Court of Arbitration and a judge serving on the PCIJ, these offences were divided into those committed against the ‘exterior’ and ‘interior’ security of France:

Among the former are machinations and holding communications with foreign powers, or their agents, to induce them to commit hostilities or enter upon war against France; committing hostile actions, not approved by the Government, which expose it to a declaration of war. Offenses against the interior safety of the state are attempts or plots directed against the governing powers, crimes tending to trouble the state by civil war, the illegal employment of an armed force, devastation and public pillage.¹⁸

Article 7 also applied to the counterfeit of the seal of France, including its currency, banknotes and official documents.¹⁹ It would appear that ‘security’ was used as an all-encompassing term and it is reasonable to suppose that it is sufficiently broad to encompass other vital interests, including the State’s sovereignty, territorial integrity, political independence and Head of State and public officials.²⁰ Foreign nationals could

¹⁷ Moore, *supra* n 2, Cameron, *supra* n 2; Akehurst, M. (1972-1973). ‘Jurisdiction in International Law’. 46 *BYIL* 145, at pp.157-158; Krizek, M.B. (1988). ‘The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice’. 6 *B.U.Int’l L.J.* 337, at pp.338-341; Ryngaert, C. (2008). ‘Jurisdiction in International Law’. Oxford: OUP, at p.96; Sarkar, L. (1962). ‘The Proper Law of Crime in International Law’. 11 *ICLQ* 446, at pp.462-463.

¹⁸ Moore, *ibid.*, at p.40.

¹⁹ *Ibid.*

²⁰ The same point applies *mutatis mutandis* to the domestic law of Turkey, *infra* n 31.

only be prosecuted for offences under Article 7 where accused persons were arrested in French territory, or the French Government obtained extradition from a foreign State.²¹ The use of protective jurisdiction in the domestic law of France at this time has led some commentators to describe it as a product of ‘nationalistic political philosophy’ and ‘the juridical by-product of the aggressive racial nationalism’, which emerged out of the French Revolution.²² Cameron has suggested, perhaps more accurately, that protective jurisdiction was ‘developed by revolutionary France as a matter of practical necessity in response to the problem of foreign invasions and attacks against French interests’.²³ The need for States to protect certain of their interests that they regard as important, as will be shown below, would also appear to explain the reason why this ground of jurisdiction developed in other areas of State practice, having no connection at all with the French Revolution. In any case, by the mid-nineteenth century, a fairly uniform pattern had emerged in State practice, whereby the national laws of the majority of other States provided for extraterritorial jurisdiction over offences committed against the State’s security and credit. Article 7 of the French Code appears to have served as the prevalent model for the drafting of criminal codes both within and outside of Europe. These States included, *inter alia*, Austria, Belgium, Brazil, China, Germany, Greece, Hungary, Italy, Luxembourg, Mexico, Norway, Netherlands, Spain, Russia and Switzerland.²⁴ It would therefore appear that, by the middle of the nineteenth century, protective jurisdiction was widely established in State practice, and recognised as the only exception to the territoriality of jurisdiction under customary international law.

The latter point is illustrated, rather effectively, by a diplomatic controversy which arose between the U.S. and Mexico in the *Cutting* incident. The incident concerned the arrest and indictment for criminal libel by Mexican authorities of Augustus K. Cutting, a U.S. national, while he was travelling in Mexico, for publishing an article in a Texan newspaper criticising a Mexican national. The U.S. Government protested the right of Mexico to prosecute an American national under Article 186 of its Penal Code, as it was based on, what subsequently came to be defined as by the Harvard Research in 1935, the theory of ‘passive personality’ jurisdiction and, therefore, was in violation of

²¹ Moore, *supra* n 2, at p.38.

²² Brierly, J.L. (1928). ‘The “Lotus” Case’. 44 *LQR* 154, at p.162; also, Krizek, *supra* n 17, at p.339; Lenhoff, A. (1964). ‘International Law and Rules of International Jurisdiction’. 50 *CornellL.Q.* 5, at p.12.

²³ Cameron, *supra* n 2, at p.36.

²⁴ Cameron, *ibid*; Moore, *supra* n 2, at p.51; Rodick, B.C. (1928). ‘The Doctrine of Necessity in International Law’. New York: CUP, at p.35.

international law. The Mexican Government argued that its law was based on the criminal codes of certain other European countries, in particular Article 7 of the French Code. In order to demonstrate that passive personality principle jurisdiction was not a valid right under customary international law, Moore, the Assistant Secretary of State to the U.S. Government, to whom reference has already been made above, undertook a comprehensive survey of extraterritorial jurisdiction in State practice.²⁵ On the basis of this analysis, Moore made a crucial distinction between the passive personality principle, which was claimed by Mexico in the present incident, and protective jurisdiction, which was used in the national laws of the majority of States, including Mexico, over ‘offenses against the safety of the state, or coinage felonies, or other particular crimes.’²⁶ The passive personality principle was, according to Moore, ‘obsolete’.²⁷ Thus, Article 186 of the Mexican Penal Code, argued Moore, ‘blends two wholly distinct, and indeed antagonistic, principles of criminal jurisdiction, and treats them as if they were the same’.²⁸

On the other hand and contrary to the position taken by Moore, the protective and passive personality principles were treated in the penal codes of some States and by jurists in the nineteenth and early twentieth century as different aspects of a single, broader ‘principle of protection’, rather than as separate jurisdictional principles.²⁹ This caused a certain amount of confusion as to the relationship between grounds of protective and passive personality jurisdiction. This very point arose in a dispute between France and Turkey in the *Lotus* case, which was submitted to the PCIJ in 1927.³⁰

3.2.1. The *Lotus* Case

The *Lotus* case concerned the collision on the high seas of a French steamer, the *Lotus*,

²⁵ Moore, *ibid.* On the *Cutting* incident, see also Moore, *supra* n 7, at pp.228-242; *Lotus*, *supra* n 7, at p.93 (Diss. Op. Judge Moore).

²⁶ *Ibid.*, at p.86.

²⁷ *Ibid.*, at p.87.

²⁸ *Ibid.*, at p.73.

²⁹ See Cameron, *supra* n 2, at p.17; Rodick, *supra* n 24, at p.35; Beckett, W.E. (1925). ‘The Exercise of Criminal Jurisdiction over Foreigners’. 6 *BYIL* 49; Blakesley, C.L., ‘Extraterritorial Jurisdiction’, in Bassiouni, M.C. (ed.) (1999). ‘International Criminal Law’. Ardsley: Transnational, vol.II, at p.67; L.H. (1927-1928). ‘Extraterritorial Criminal Jurisdiction’. 26 *Mich.L.Rev.* 429, at p.430; Westlake, J. (1910). ‘International Law’. Cambridge: CUP, at p.262. See also Lauterpacht, H. (1947). ‘Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens.’ 9 *CLJ* 330, at p.343.

³⁰ *Supra* n 7.

and a Turkish vessel, the *Boz Kourt*, which resulted in the deaths of eight Turkish sailors, and the prosecution by Turkish authorities of a French officer. France contended that protective jurisdiction was the only recognised exception to the territoriality of jurisdiction under international law. Accordingly, Turkey was not entitled to extend its law to the conduct of a French national aboard a French vessel on the high seas. Turkey accepted the validity of protective jurisdiction, but argued that customary international law also permitted passive personality jurisdiction. The Turkish Penal Code was based on a combination of the protective and passive personality principles under a broader principle of protection, in the same way as the Mexican Penal Code in the *Cutting* incident. Thus, Article 6 of the Turkish Penal Code, which according to Turkey was ‘taken word for word from the Italian Penal Code’, provided for extraterritorial jurisdiction over ‘[a]ny foreigner who ... commits an offence abroad to the prejudice of Turkey or of a Turkish subject’.³¹ As France and Turkey both recognised principles of extraterritorial jurisdiction, and the incident in the present case occurred on the high seas and had caused ‘effects’ on a Turkish vessel, the majority of the Court ruled in favour of Turkey, as its jurisdiction could ‘also be justified from the point of view of the so-called territorial principle’.³² While the majority of the Court recognised that a State is permitted by international law to exercise prescriptive jurisdiction outside its territory under certain ‘principles’ of jurisdiction, it was not prepared to discuss the more complex issue as to what these principles might have been, or to clarify their scope of application in State practice.³³ Consequently, the majority of the Court, while declaring protective jurisdiction to be consistent with international law, did not distinguish protective jurisdiction *stricto sensu* from the more controversial theory of passive personality.³⁴

The Dissenting Opinions of the *Lotus* case are worthy of consideration, particularly as the case was decided by the casting vote of the President of the Court and several of the dissenting judges did express opinion on principles of jurisdiction, including protective jurisdiction. Judge Moore dissented on the single ground that the Turkish Penal Code was based on what he called the ‘protective principle’, which he believed to be

³¹ Law No. 765 of 1st March 1926 (Official Gazette No.320 of 13th March 1926), cited in *Lotus*, *ibid.*, at pp.9, 14.

³² *Ibid.*, at p.23.

³³ See also chapter one.

³⁴ Lauterpacht, *supra* n 29, at p.343.

‘contrary to well established principles of international law’.³⁵ In support of his argument, Moore cited Hall, who rejected the validity of the ‘protective principle’ because it created concurrent jurisdiction in the territory of foreign States.³⁶ Moore asserted that: ‘[i]n substance, it means that the citizen of one country, when he visits another country, takes with him for his “protection” the law of his own country and subjects those with whom he comes into contact to the operation of that law.’³⁷ It is apparent that Moore, as with Hall, was referring here to the passive personality principle of jurisdiction. It is important to note that Moore was dismissive, more generally, of the very idea that extraterritorial criminal jurisdiction may be exercised in another State’s territorial sovereignty, as it enabled the State to claim that ‘its penal laws apply to other countries and to what wholly takes place within such countries, or, if it does not claim this, that it may punish foreigners for alleged violations, even in their own country, of laws to which they are not subject.’³⁸ Moore thus took the view that jurisdiction other than territoriality was not a part of customary international law.³⁹

Moore made his view on extraterritorial jurisdiction clear elsewhere, in his earlier report as Assistant Secretary of State arising out of the *Cutting* incident. In that report, Moore, in support of an exclusively territorial approach to jurisdiction, asserted that ‘in no case has an English or an American court assumed jurisdiction, even under statutes couched in the most general language, to try and sentence a foreigner for acts done by him abroad’.⁴⁰ Moore concluded his report by observing that protective jurisdiction is ‘advocated by so many continental jurists and provided for in so many continental codes’; nevertheless, he doubted the legality of this jurisdiction and asserted that ‘it may become necessary for foreign powers to consider whether those measures [adopted pursuant to protective jurisdiction] violate their sovereign prerogatives or the rights of their citizens’.⁴¹ This may explain the reason why Moore in the *Lotus* case did not examine State practice and, instead, supported his argument by citing Hall, a jurist who also opposed extraterritorial jurisdiction. It may also explain why Moore deliberately did not distinguish protective jurisdiction *stricto sensu* from the controversial passive

³⁵ *Lotus*, *supra* n 7, at pp.91-92 (Diss. Op. Judge Moore).

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*, at p.93.

³⁹ *Ibid.*, at p.94.

⁴⁰ Moore, *supra* n 2, at p.34.

⁴¹ *Ibid.*, at p.126.

personality principle under the broader ‘principle of protection’, in the same way that Moore had previously done so in his report arising out of the *Cutting* incident.⁴² To be sure, the same approach was used in the Dissenting Opinion of Judge Finlay, in order to assert that protective jurisdiction proper is not valid under international law.⁴³

Judge Weiss, by way of contrast, did distinguish protective jurisdiction over offences committed against the ‘institutions, security and credit of the State’ from what he called ‘*the right of protection*’.⁴⁴ However, Judge Weiss did not distinguish the principle of territorial sovereignty from the concept of jurisdiction which flows from that sovereignty; consequently, Judge Weiss conceptualised protective jurisdiction as an ‘extension of territorial jurisdiction’, rather than as a principle of extraterritorial jurisdiction which is an exception and functions subsidiary to territoriality.⁴⁵ This led Judge Weiss to question the validity of protective jurisdiction and to restrict the concept of jurisdiction as being ‘based on *and limited by*’ the territory over which a State exercises sovereignty.⁴⁶ Judge Loder, as with Judge Altamira, also made the crucial distinction between protective jurisdiction over offences ‘directed at the security of the State itself’, which has been included in the national laws of a ‘large majority’ of States, from what he called the ‘system of protection’, which has not been accepted by the ‘great majority of States’.⁴⁷

3.2.2. An Absolute Approach to Territoriality

Judges Moore, Finlay, Weiss and Nyholm dismissed the validity of protective jurisdiction in favour of an ‘absolute’ territorial approach to criminal jurisdiction in international law. This extreme and rigid view was not uncommon, particularly among Anglo-American jurists, in the nineteenth and early twentieth century. The argument against extraterritorial jurisdiction by these jurists, such as Hall, Oppenheim, Westlake and Woolsey, was similar to that advanced by Moore in the *Lotus* case, above, and was typically expressed along the following lines: first of all, the State’s nationals should not be punished for violating the laws of foreign countries, with which they are unfamiliar.

⁴² On the distinction between these two theories, see De Visscher, *infra* n 75, at p.258.

⁴³ *Lotus*, *supra* n 7, at p.56 (Diss. Op. Judge Finlay); also *ibid.*, at p.62 (Diss. Op. Judge Nyholm).

⁴⁴ *Ibid.*, at pp.45-46 (Diss. Op. Judge Weiss).

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, at pp.44-45.

⁴⁷ *Ibid.*, at pp.35-36 (Diss. Op. Judge Loder); *ibid.*, at p.100 (Diss. Op. Judge Altamira).

Secondly, the concept of jurisdiction over the State's territory is exclusive to the sovereign; therefore, the protective principle constitutes an invasion of sovereign rights and a violation of the State's independence.⁴⁸ Both of these arguments, however, appear to be somewhat overstated, as was opined by Wharton in his 1885 treatise.⁴⁹ Wharton added, moreover, that:

There is no civilised State which has not passed statutes making it a criminal offence for foreigners even in their own countries to forge its securities, or make false and fraudulent oaths before its consuls.⁵⁰

In the *Lotus* case, it is rather surprising that, in support of an exclusively territorial approach to jurisdiction, Judges Moore and Weiss relied only on the supposed practice of the U.S. and Britain, and particularly the *Cutting* incident.⁵¹ This was also despite the fact that Moore's own report arising out of that incident revealed that protective jurisdiction was widely established and practically uniform in State practice and, arguably, part of customary international law. Moore's report also illustrated that the U.S. Government did not regard protective jurisdiction as being contrary to international law and carefully limited its diplomatic protest to the principle of passive personality. Britain had similarly made it clear in the mid-nineteenth century that it accepted the validity of protective jurisdiction in international law, although this was not the case in relation to offences committed against the State's nationals under the passive personality principle.⁵² As will be explained below, both of these latter countries extended their own national laws to conduct outside of their respective territories, on what would appear to be based on the protective principle. It will be recalled from chapter two that protective jurisdiction has traditionally been linked with and exercised as part of a broad right of self-defence by these countries. This enabled Anglo-American jurists, such as Moore, to claim the right to exercise protective jurisdiction under the cloak of a broad right of self-defence and maintain, at the same time, that international

⁴⁸ See Hall, E.W., 'A Treatise on International Law' (ed. by Higgins, P.A. (Oxford: Clarendon, 1924)), at pp.263-264; Institute of International Law, session at Brussels in 1879, cited in Moore, *supra* n 2, at p.112; Westlake, cited in *ibid.*, at p.108; Westlake, J. (1894). 'Chapters on the Principles of International Law'. Cambridge: CUP, at p.126; Woolsey, H.L. (1926). 'Extraterritorial Crimes'. 20 *AJIL* 757; L.H., *supra* n 29 and authorities cited therein.

⁴⁹ Wharton, F. (1885). 'A Treatise on Criminal Law'. Philadelphia: Kay & Brother, Book I, para.284; also *ibid.*, Book II, para.1264.

⁵⁰ *Ibid.*, at p.312.

⁵¹ *Lotus*, *supra* n 7, at p.93 (Diss. Op. Judge Moore); *ibid.*, at pp.44-45 (Diss. Op. Judge Weiss).

⁵² McNair, A. (1956). 'International Law Opinions'. London: CUP, at pp.152-153; also *Emperor of Austria v Day & Kossuth* (1861), 30 L.J.Ch. 690.

law limited jurisdiction to that of territoriality.⁵³

Judge Finlay relied on the commentary of Oppenheim to dismiss the validity of protective jurisdiction.⁵⁴ Oppenheim preferred a strict territorial approach to jurisdiction and suggested that protective jurisdiction ‘ought’ not to be valid in international law; at the same time, and contrary to his view, Oppenheim accepted the validity of protective jurisdiction over violations of the laws of war. Oppenheim also came to recognise that this view was not reflective of State practice and therefore could no longer be sustained. Accordingly, subsequent volumes of Oppenheim abandoned this approach to reflect more accurately ‘the practice of States’ and ‘common sense’.⁵⁵ Judge Nyholm, by way of contrast, dismissed the validity of protective jurisdiction on the ground that the recent effort by the League of Nations to codify international law had decided to ‘set aside the question of the extension of criminal jurisdiction’ as the derogation from the territorial principle had not been recognised by ‘important nations’, including the U.S. and Britain.⁵⁶ As will be shown below, however, the League’s decision not to submit the topic of extraterritorial jurisdiction to a codification conference was based on a recommendation by Brierly, an Anglo-American jurist, whose report lacked rigour and accuracy, and Brierly himself advocated a strict territorial approach to jurisdiction.

3.2.3. Extraterritorial Jurisdiction over ‘Piracy’ on the High Seas

While Moore and Finlay opposed the exercise of extraterritorial jurisdiction in another State’s territorial sovereignty, both of them accepted, as an exception to the territoriality of jurisdiction, the right under international law to exercise expansive jurisdiction - what Moore called a theory of ‘universal jurisdiction’ - over ‘piracy by the law of nations’, that is, on the high seas and outside the exclusive territorial sovereignty of any State.⁵⁷ It is notable that, Moore, in support of this theory, turned not to State practice but, rather, to the commentaries of Wheaton and Hall and, implicitly, the previous academic commentary of Moore. These Anglo-American jurists, eminent as they are, did not examine the development of jurisdiction over piracy in State practice either; nor, for that

⁵³ Cameron, *supra* n 2, at p.45; McNair, *ibid.*, at p.154.

⁵⁴ *Lotus*, *supra* n 7, at p.57 (Diss. Op. Lord Finlay).

⁵⁵ Oppenheim, L. (1955). ‘International Law’ (ed. by Lauterpacht, H. London: Longmans), vol.I, at p.331. See also Lauterpacht, *supra* n 29, at pp.342-343.

⁵⁶ *Lotus*, *supra* n 7, at p.62 (Diss. Op. Judge Nyholm).

⁵⁷ *Ibid.*, at pp.69-71 (Diss. Op. Judge Moore); *ibid.*, at p.51 (Diss. Op. Judge Finlay).

matter, did they suggest that jurisdiction over piracy is based on a theory of universality. Although it is not acknowledged by Moore in the present case, the earlier opinion of Moore in the *Cutting* incident did not define jurisdiction over piracy as a theory of ‘universality’.⁵⁸ The reason why Moore elaborated an entirely new theory of ‘universal jurisdiction’ over an international crime of piracy was due to an effort by Moore to distinguish between extraterritorial jurisdiction over piracy on the high seas, which had undeniably developed in the practice of the Britain and the U.S., from extraterritorial jurisdiction in general international law over crimes occurring in another State’s territorial sovereignty, the latter of which Moore regarded as being contrary to international law. To that end, Moore suggested that jurisdiction over piracy on the high seas is exercised ‘in the interest of all’. On closer inspection, it would appear that the opinions of Moore and Finlay misinterpreted the universal and equal right under international law of all independent States to exercise jurisdiction on the high seas - ‘the scene of the pirate’s operations’⁵⁹ - in order to protect certain of their own vital interests, a number of which were shared by the international community, with a theory of universal jurisdiction. This alternative interpretation to the development of jurisdiction over piracy, which is supported by State practice, is returned to below.

The judgment in the *Lotus* case and the Dissenting Opinions in that case illustrate that the judges serving on the PCIJ had a limited understanding of theories relating to grounds of jurisdiction under customary international law and the protective principle in particular. The majority of the Dissenting Opinions supported, with the exception of piracy on the high seas, an absolute territorial approach to jurisdiction in international law, while protective jurisdiction was described as if it was a new phenomenon and no attention was dedicated to its origins; little or no effort was made to elucidate the development, nature and scope of this jurisdiction, including over piracy on the high seas, or to clarify its relationship with other grounds of jurisdiction, most notably passive personality. These considerations are of great importance, given that the *Lotus* case is the first and only occasion that an international court has directly discussed principles of jurisdiction in international law.

The idea that the theory of ‘universal jurisdiction’, as defined by Judge Moore, has

⁵⁸ Moore, *supra* n 2, at p.37.

⁵⁹ *Lotus*, *supra* n 7, at p.70 (Diss. Op. Judge Moore).

traditionally developed over ‘piracy by the law of nations’ as the only established exception to the territoriality of jurisdiction had a profound influence on subsequent legal thought, and Moore’s Dissenting Opinion continues to be cited as a reliable authority by courts and in legal scholarship.⁶⁰ The Dissenting Opinions in the *Lotus* case have been relied upon by some commentators to dismiss the validity of protective jurisdiction.⁶¹ It has also been maintained well into the twenty first century that Anglo-American countries have traditionally opposed protective jurisdiction.⁶² Thus, Ryngaert has recently suggested that protective jurisdiction was ‘historically non-existent’ in common law countries.⁶³ However, contrary to the opinion of Anglo-American jurists, the idea that Anglo-American countries adhered to an exclusively territorial approach to criminal jurisdiction is simplistic and fallacious.⁶⁴ It follows that the supposed divergence between the Anglo-American and Continental schools of thought in international law in relation to jurisdiction over foreign nationals abroad was considerably overstated.⁶⁵ Many of these issues are reflected in the first efforts made to codify international law.

3.3. Early Efforts to Codify Protective Jurisdiction

Since the late nineteenth century, several ‘private’ efforts - that is, draft codes and proposals prepared by research societies and institutions - have been made to codify protective jurisdiction. The first of these was made by the Institute of International Law, which adopted at its 1879 session in Brussels, and reaffirmed at its 1883 session in Munich, a resolution containing protective jurisdiction:

Each state has the right to punish for acts committed outside of its territory by

⁶⁰ E.g., Huang, Y. (2012). ‘Universal jurisdiction over Piracy and East Asian Practice’. 11 *Chinese JIL* 623, at p.625; *Attorney-General v Mohamud Mohammed Hashi & 8 others* [2012] eKLR, para.31; *Republic v Houssein Mohammed Osman & Ten Others*, SCSC, Criminal Side No.19 of 2011, para.32; *U.S. v Hasan*, 747 F.Supp.2d599 (E.D. Va., 2010), at p.25.

⁶¹ Brierly, *supra* n 22, at p.162; Garcia-Mora, M.R. (1958). ‘Criminal Jurisdiction over Foreigners for Treason and Offences Against the State Committed upon Foreign Territory’. 19 *U.Pitt.L.Rev.* 567, at p.587.

⁶² *Attorney-General of the Government of Israel v Adolf Eichmann*, 36 ILR 277 (Supreme Court, 29 May 1962); U.N. Doc.A/GN.4/1/Rev.I (10 February 1949); Brierly, J.L., ‘The Law of Nations: An Introduction to the International Law of Peace’ (ed. by Waldock, H., Oxford: Clarendon Press, 1963), at p.300; Shcaor-Landau, C. (1980). ‘Extra-Territorial Penal Jurisdiction and Extradition’. 29 *ICLQ* 274; Chehtman, A. (2010). ‘The Philosophical Foundations of Extraterritorial Punishment’. Oxford: OUP, at p.71.

⁶³ *Supra* n 17, at p.97.

⁶⁴ See also Preuss, L. (1944). ‘American Conception of Jurisdiction with Respect to Conflicts of Law on Crime’. 30 *Problems of Peace and War* 184, at p.191.

⁶⁵ Lauterpacht, *supra* n 6; Scott, *supra* n 6.

foreigners, in violation of its penal laws, when these acts constitute an attack on the social existence of the state, compromising its safety, and which are not cognizable by the penal law of the country where they take place.⁶⁶

At both sessions the resolution was regarded as a valid exception to the territoriality of jurisdiction in international law. Protective jurisdiction is permitted by the resolution where the criminal law of the *locus delicti* does not prohibit the particular conduct; nevertheless, national laws applied protective jurisdiction irrespective of whether an act was prohibited in the *locus delicti*.⁶⁷ It is also worth noting that the resolution defined jurisdiction in rather narrow terms, namely where proscribed conduct ‘constitute[s] an attack on the social existence of the state, compromising its safety’, which does not reflect the national laws on which the resolution is based; and, conceptually, it appears to treat jurisdiction in a similar way to self-defence.⁶⁸ It is for this reason, perhaps, that the Institute, in a resolution adopted in 1931, redefined protective jurisdiction as covering crimes committed against the State’s ‘security’ and ‘credit’ and the abovementioned words were omitted.⁶⁹

3.4. League of Nations Committee of Experts for the Progressive Codification of International Law

The first public effort to codify protective jurisdiction was made by the League of Nations. In 1924 the Fifth Assembly of the League of Nations adopted a resolution to prepare a list of subjects under international law that were ‘sufficiently ripe for codification’ and regulation by international agreement was ‘desirable and realisable’.⁷⁰ To that end, the League’s Council appointed a ‘Committee of Experts for the Progressive Codification of International Law’ (the Committee).⁷¹ At its First Session in 1925, one of the subjects identified by the Committee was the ‘criminal competence of States in respect of offences committed outside their territory’.⁷² The Committee decided to appoint a Sub-Committee, consisting of Brierly, as Rapporteur, and De Visscher, to enquire ‘[w]hether it is possible to lay down, by way of conventions, principles governing the criminal competence of States in regard to offences committed

⁶⁶ Cited in Moore, *supra* n 2, at pp.109, 112.

⁶⁷ Westlake (1894), *supra* n 48, at p.128.

⁶⁸ See chapter two.

⁶⁹ Cited in Scott, *supra* n 6, at p.89. See also the resolution by the International Prison Congress in Brussels in 1935, 29 *AJIL (Supp.)* (1935), at p.639.

⁷⁰ Documents from the League of Nations Committee of Experts for the Progressive Codification of International Law, 26 *AJIL (Spec. Supp.)* (1926) 1, at pp.2-3.

⁷¹ *Ibid.*, at pp.12-15.

⁷² *Ibid.*

outside their territories and, if so, what these principles should be.⁷³ At its Second Session in 1926, the Committee adopted Brierly's report.⁷⁴ It is useful, therefore, to examine Brierly's report.⁷⁵

Brierly was of the view that the codification of extraterritorial jurisdiction on the basis of a convention would be impracticable since it depended on a 'fundamental question whether the territorial basis is to admit of any exception at all'. Brierly suggested that:

the crux of the problem lies in the divergence of view between those States which do and those which do not allow the legitimacy of any such exceptions, and we have to ask ourselves whether the Committee would be justified in hoping for a possible reconciliation between these two groups of States.⁷⁶

According to Brierly, the U.S., Britain, Portugal and Denmark 'hold the view that by international law no State is entitled to assume such jurisdiction'.⁷⁷ It should be noted, from the outset, that Brierly did not undertake any primary research, for example, of State practice and the actual views of States, and, it would appear, little primary analysis either. Rather, in support of this finding, *inter alia*, Brierly relied, rather surprisingly, upon the academic commentary of Beckett.⁷⁸ Beckett did not undertake any primary research either, or cite any secondary commentary to support his argument.

Brierly proposed bridging the supposed gap between the two groups of States which he had identified with the theory of objective territoriality, a wholly different and 'territorial' theory of jurisdiction.⁷⁹ Once again, however, in support of this proposal, Brierly cited Beckett.⁸⁰ Beckett observed that protective jurisdiction is 'claimed by ... a large number of states' and yet he refused to recognise the validity of this jurisdiction as 'an exception to the strict rule of territoriality'; instead, suggested Beckett, protective jurisdiction could be replaced by the objective theory of territorial jurisdiction.⁸¹ Beckett did not provide any reasoned argument to support this assertion and his view was

⁷³ *Ibid.*

⁷⁴ Committee of Experts for the Progressive Codification of International Law, 'Criminal Competence of States in respect of Offences Committed Outside their Territory', 20 *AJIL (Spec. Supp.)* (1926) 252.

⁷⁵ Report of the Sub-Committee by Brierly, J.L. (Rapporteur) & De Visscher, C., 'Jurisdiction over Extraterritorial Crime', *ibid.*, Annex, at p.253.

⁷⁶ *Ibid.*, at p.256.

⁷⁷ *Ibid.*, at pp.253-254.

⁷⁸ *Ibid.*, citing Beckett, *supra* n 29.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Beckett, *supra* n 29, at pp.56-57.

typical of that of Anglo-American jurists at that time. Nonetheless, Brierly accepted Beckett's argument and he assumed that objective territoriality would provide an adequate basis of jurisdiction over all acts by foreign nationals abroad against the State's 'security' and 'credit', even though, as was acknowledged by Brierly, this did not reflect the practice of the majority of States.⁸² The theory of territoriality, as has already been explained in chapter two, is wholly inadequate, in and of itself, to protect the State's sovereignty and certain of its vital interests, including where such interests are located abroad.

On closer inspection, it may be presumed that the reason why Brierly preferred the theory of objective territoriality is because it resonated with his own views of a strict territorial approach over crimes committed in another State's territorial sovereignty. Indeed, Brierly made his view on protective jurisdiction well-known elsewhere; thus, commenting on the *Lotus* case, Brierly cited Beckett and the Dissenting Opinion of Judge Moore in support of the assertion that Britain and the U.S. are 'firmly attached to the territorial basis of criminal jurisdiction' and that customary international law limits jurisdiction to a State's territory.⁸³ In order to dismiss the validity of protective jurisdiction under international law, Brierly adopted the same argument as Judges Moore and Finlay in the *Lotus* case and treated the protective and passive personality principles as 'the same'.⁸⁴ Brierly also suggested that protective jurisdiction is 'novel' and at 'variance with the whole organisation of the world into independent, but *territoriality delimited*, States.'⁸⁵

The alternative proposal made by Brierly was to codify protective jurisdiction by enumerating a uniform list of specified offences over which this jurisdiction should be permissible.⁸⁶ The reason for this proposal is that Brierly was concerned with the scope and potential abuse of protective jurisdiction and he suggested that such an approach would mean that States, 'instead of reserving to themselves the right to decide ... what acts endanger their security, would accept an agreed and uniform list in which such acts

⁸² Brierly, *supra* n 75, at pp.256-257.

⁸³ Brierly, *supra* n 22, at pp.156, 161.

⁸⁴ *Ibid.*, at p.161.

⁸⁵ *Ibid.*, at p.162.

⁸⁶ *Supra* n 75, at p.257.

would be specified.⁸⁷ This proposal seems to have been made by Brierly in response to the concern raised by Beckett that the [t]ype and number of acts made criminal [under protective jurisdiction] is so various [and] a state is judge as to what endangers its security and credit'.⁸⁸ In any case, this latter proposal was ultimately rejected by Brierly on the ground that those States which adhered 'strictly' to the territoriality of jurisdiction would perceive protective jurisdiction as an 'invasion of its sovereign rights', while those States which did recognise the validity of this jurisdiction, by curtailing this right, 'may throw doubt on its right to self-defence'.⁸⁹ It is worth noting, by way of aside, that those States which supposedly perceive protective jurisdiction as an 'invasion' of their sovereign rights appears to have been taken by Brierly from the report by Moore in the *Cutting* incident, although it is not expressly acknowledged as such by Brierly, and it is a view that is unfounded.⁹⁰

The supposed divergence between the two groups of States identified by Brierly appears to be overstated and his discussion is wrongly postulated. In the first place, although it was not realised by Brierly, the U.S. has traditionally preferred to conceptualise jurisdiction in terms of an expansively interpreted theory of objective territoriality which, according to Preuss, one of the research assistants of the Harvard Research for the codification of protective jurisdiction, is in many cases 'scarcely distinguishable, in its actual operation, from the principle of State security or protection'.⁹¹ Had Brierly examined State practice then he may have realised that the U.S. and Britain did not adhere exclusively to a theory of territoriality and the national laws of these countries may be interpreted as including several early examples of protective jurisdiction.⁹² This is best illustrated, perhaps, by the following example.

The decision of the U.S. Supreme Court in the *Schooner Exchange v McFaddon* is often cited as embodying the principle of territoriality in modern international law, in which Chief Justice Marshall stated that '[t]he jurisdiction of the nation within its own territory

⁸⁷ *Ibid.*

⁸⁸ Beckett, *supra* n 29, at p.56.

⁸⁹ *Supra* n 75, at p.257.

⁹⁰ Moore, *supra* n 2, at p.126.

⁹¹ Preuss, *supra* n 64, at p.202; also Harvard Research, *infra* n 116, at p.546.

⁹² E.g., Law Commission, 'Territorial and Extraterritorial Extent of the Criminal Law', Working Paper No.29 (1970); Law Commission, Final Report, 'Report on the Territorial and Extraterritorial Extent of the Criminal Law', Paper No.91 (1978). See also Merchant Shipping Act of 1854 (Short Title), s.267; *U.S. ex rel. Majka v Palmer*, 67 F.2d146 (7th Cir., 1933); *Giles v Tumminello*, 38 ILR 120; Harvard Research, *infra* n 116, at p.544; Lauterpacht, *supra* n 29, at p.343; Wharton, *supra* n 49, at p.294 & para.285.

is necessarily exclusive and absolute.⁹³ Marshall was referring *inter alia* to the enforcement of jurisdiction by a sovereign ‘within its own territory’.⁹⁴ However, the earlier opinion by Marshall before the Supreme Court in the case of *Church v Hubbart* has been treated by the U.S. Government and domestic courts as the ‘essence’ of protective jurisdiction and being ‘no less vital today’ than it was in the early nineteenth century.⁹⁵ In that case, Portuguese authorities seized two U.S.-flagged merchant vessels hovering on the high seas, off the coast of Brazil, for allegedly attempting to participate in Portuguese colonial trade, contrary to a Portuguese statute of 1605, entitled: ‘A law by which foreign vessels are prohibited from entering the ports of *India, Brazil, Guinea, and Islands*, and other provinces of *Portugal*’.⁹⁶ The Supreme Court refrained from commenting on the legality of the seizure, but Marshall stated *obiter*:

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora* [*inter alia*]... cannot be admitted. [...] It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. *But its power to secure itself from injury, may certainly be exercised beyond the limits of its territory. Upon this principle the right of a belligerent to search a neutral vessel on the high seas for contraband of war, is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy: so too a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention.*⁹⁷

Marshall thus recognised the existence, under the law of nations, of a ‘universally acknowledged’ principle of prescriptive jurisdiction, which could be exercised by a sovereign over foreign nationals ‘beyond the limits of its territory’, on the high seas, in order to ‘secure itself from injury’, and was applicable both to belligerents in time of war and to States in time of peace.⁹⁸ Marshall’s opinion, given that it was merely *obiter*,

⁹³ 7 Cranch U.S. 116 (1812), at p.136.

⁹⁴ *Ibid.*

⁹⁵ 2 Cranch, U.S. 187 (1804). See also *U.S. v Rodriguez*, 182 F.Supp.479 (S.D. Cal., 1960), at p.488; *U.S. v Gonzales*, 776 F.2d931 (11th Cir., 1985), at pp.938-939; *U.S. v Baker*, 609 F.2d134, at p.136; *Rocha v U.S.*, 288 F.2d545 (9th Cir., 1961), at p.549; *U.S. v Cardales*, 168 F.3d548. (1st Cir., 1999), at p.553; Senate Report No.1036, 74th Cong. 1st Sess. 5 (1935), cited in *U.S. v Romero-Galue*, 757 F.2d1147 (11th Cir., 1985), at pp.1154.

⁹⁶ *Ibid.*, at pp.189-190.

⁹⁷ *Ibid.*, at pp.234-235 (italics added).

⁹⁸ See also *Queen v Keyn* [1876] 2 Ex.D. 63, at p.214 (Lord Cockburn); Dickinson, D.M. (1926). ‘Jurisdiction at the Maritime Frontier’. 40 *Harv.L.Rev.* 1.

did not expressly specify the interests that a State may protect, other than its ‘colonial commerce, which is claimed by all nations holding distant possessions’, which was the concern of Portugal in the present case.⁹⁹ Nevertheless, it would appear that the right of a State to prevent ‘injury’ to itself is broad enough to encompass other interests regarded as important, for example, the State’s sovereignty and sovereign independence, territorial integrity, security and its nationals. In recognising the right of protective jurisdiction, Marshall was careful to affirm the right of the U.S. to prescribe its own domestic law over foreign nationals on the high seas in order to protect certain of its own interests, including its revenue and customs.¹⁰⁰

It suffices to say that an important aspect of the development of protective jurisdiction under customary international law during the eighteenth and nineteenth centuries, of which the national laws of Portugal, Britain and the U.S. have formed a part, has been in respect of offences committed on the high seas in areas contiguous to the prescribing State’s coasts (and the coasts of its colonies) for the protection of national interests that were deemed vital. These interests included, for example, its sovereignty and sovereign independence, security, territorial integrity, trade and commerce, fisheries and customs and revenue, as well as belligerent rights to search neutral vessels and neutrality rights of non-belligerents in time of war.¹⁰¹

It is perhaps notable that jurisdiction over piracy was summarily dismissed by Brierly as having ‘little in common’ with the subject of extraterritorial jurisdiction over foreign nationals on the basis that it occurred on the high seas (as opposed to the State’s

⁹⁹ *Supra* n 95, at p.235.

¹⁰⁰ *Ibid.*, at p.236.

¹⁰¹ E.g., Rodick, *supra* n 24, at pp.26-28; *Le Louis*, (1817) 2 Dodson’s Admiralty 210, at pp.244-246; British Territorial Waters Jurisdiction Act of 1878, 41-42 Vict., c.73, 579 (1878); Fur Seal Arbitration, Washington, D.C.: Government Printing Office (1895), vol.IX, pp.130-179 and authorities cited therein; Ukase of 1821, issued by the Emperor of Russia, cited in Fur-Seal Arbitration, *ibid.*, vol.I, at pp.66-68; Treaty of Helsingfors (19 August 1925) for the Suppression of the Contraband Traffic in Alcoholic Liquors between Germany, Denmark, Estonia, Finland, Latvia, Norway, Poland, Sweden and the Union of Socialist Soviet Republics, in *Gulf of Finland (Control Zone) Case* 8 ILR 406; Brown, P.M. (1923). ‘The Marginal Sea’. 17 *AJIL* 89, at p.92; Brown, P.M. (1940). ‘Changing Concepts of International Law’. 34 *AJIL* 503, at pp.504-505; Brown, P.M. (1940). ‘Protective Jurisdiction’ 34 *AJIL* 112; Brown, P.M. (1953). ‘Protective Jurisdiction over Marginal Waters’. 47 *AJIL* 452, at pp.453-454; Colombos, J.C. (1923). ‘Territorial Waters’. 9 *Problems of Peace and War* 89, at pp. 90-91; Jessup, P.C. (1937). ‘The Anti-Smuggling Act of 1935’. 31 *AJIL* 101, at pp.103-105; Masterson, W.E. (1927). ‘National Jurisdiction in the Marginal Seas over Foreign Smuggling Vessels’. 13 *Problems of Peace and War* 53; Masterson, W.E. (1928). “‘Territorial Waters’ and International Legislation”. 14 *Problems of Peace and War* 45, at pp.46-56; Scott, J.B. (ed.) (1916). ‘Resolutions of the Institute of International Law dealing with the Law of Nations’. New York: OUP, at pp.113-114.

territorial sovereignty) and that it is 'justiciable by any State'.¹⁰² It seems that Brierly was influenced on this issue, once again, by the commentary of Moore, whose opinion has already been discussed above, and by Beckett, who asserted that '[p]iracy stands on such an exceptional basis that it throws no light on the question of penal jurisdiction generally'.¹⁰³ Had Brierly included jurisdiction over piracy in his analysis then he may have concluded that it represented an important aspect of the historical development of protective jurisdiction, not least in the practice of three of the principal maritime powers, namely Britain, Portugal and the U.S.¹⁰⁴ Putting to one side the development of jurisdiction over piracy, a point to which the present chapter shall return below, the other important implication is that the subject of jurisdiction over piracy was dealt with by the League as a completely separate study.¹⁰⁵ The Rapporteur, Matsuda, did not appear to undertake research of primary sources and suggested that 'every' State has the right to exercise and enforce jurisdiction over pirates on the high seas.¹⁰⁶ However, Matsuda did not examine or define the ground of jurisdiction applicable over piracy either.

Brierly's conclusion was that the codification of extraterritorial jurisdiction would 'demand sacrifices from one or from both groups of States in a matter which is clearly one of great delicacy'.¹⁰⁷ In turn, the Committee, after studying Brierly's report, concluded in 1926 that the codification of the law on extraterritorial jurisdiction, 'although desirable, would encounter grave political and other obstacles'.¹⁰⁸ Consequently, the Committee refrained from including this topic in the provisional list of subjects which were 'ripe' for codification to be communicated to governments for their 'opinion' and, in turn, it was not included in the list of topics for deliberation at the 1930 Hague Conference for the Codification of International Law.¹⁰⁹

It is clear that the Committee regarded the codification of protective jurisdiction as 'desirable'. The reason why the Committee decided not to include this jurisdiction in its list of topics as 'ripe' for codification appears to have been due to practical and political,

¹⁰² *Supra* n 75, at p.253.

¹⁰³ Beckett, *supra* n 29, at p.45.

¹⁰⁴ See Garrod, *supra* n 3.

¹⁰⁵ League of Nations Committee of Experts, 'Questionnaire No. 6: Piracy'. 20 *AJIL (Spec. Supp.)* 222.

¹⁰⁶ *Ibid.*, at pp. 225, 228-229.

¹⁰⁷ *Supra* n 75, at p.258.

¹⁰⁸ *Supra* n 74, at p.253.

¹⁰⁹ *Supra* n 70, at pp.12-20.

rather than legal, considerations. As is made clear by the Committee's terms of reference, the League had limited itself to the selection of subjects of international law whose codification by binding international conventions was 'desirable and realisable at the present moment' and which could be adopted by a conference to be convened in the immediate future. In that regard, the Committee mistakenly placed too great emphasis on Brierly's conclusion that the U.S. and Britain opposed any exception to the territoriality of jurisdiction and therefore the negotiation of a convention would 'demand sacrifices'. The perceived opposition by the U.S. and Britain should not be underestimated; indeed, it will be recalled that Judge Nyholm in his Dissenting Opinion, above, dismissed the validity of protective jurisdiction by relying upon Brierly's report and the assumption that derogation from territoriality had not been recognised by 'important nations'.¹¹⁰ It is certainly the case that these States were regarded as 'Great Powers' whose views and cooperation would undoubtedly be necessary in the formulation a convention on a particular subject of international law, even though the U.S. was not a member of, and opposed, the League.¹¹¹ The Committee's terms of reference made clear that subjects selected for codification would be communicated by the League's Secretariat to States, 'whether Members of the League or not, for their opinion'.¹¹² This is probably what the Committee had in mind by its suggestion *inter alia* that a convention would face 'grave political and other obstacles'. Incidentally, the Committee would have had in mind that the League in the inter-war period was in crisis and the political climate at the time was far from an environment that was favourable for the negotiation of a subject that was - to use Brierly's words - one of 'great delicacy'.

The other reason why the Committee may have decided not to include protective jurisdiction as part of the League's codification effort is because of its 'close connection' with the subject of extradition.¹¹³ Brierly was appointed as Rapporteur for the study of extradition. Having examined Brierly's report, the Committee concluded that the difficulties surrounding extradition were 'too great' for a convention to be

¹¹⁰ *Lotus*, *supra* n 7, at p.62 (Diss. Op. Judge Nyholm). See also Westlake, *supra* n 29, at p.263.

¹¹¹ See Myers, D.P. (1926). 'Representation in the League of Nations Council'. 20 *AJIL* 689.

¹¹² Resolution of 22 September 1924, cited in Documents from the League of Nations, *supra* n 70.

¹¹³ League of Nations, Committee of Experts for the Progressive Codification of International Law, 'Report on Extradition'. 20 *AJIL* (*Spec. Supp.*) (1926) 242, at p.251.

‘realisable in the near future’.¹¹⁴ It is certainly the case that the Committee may have viewed a convention on extraterritorial jurisdiction, which would to a great extent be dependent on inter-State cooperation and extradition for the enforcement of jurisdiction, as impracticable due to the perceived unwillingness of some States to extradite their own nationals for trial abroad.

The upshot of the Committee’s decision *inter alia* is that protective jurisdiction was not studied and codified by the League. That is despite evidence to suggest that such jurisdiction was, in fact, ‘ripe’ for codification. Although the Hague Conference ultimately did not produce any results and the League’s codification effort collapsed in 1931, governments did not have the opportunity to transmit to the Committee reports on their views and practice on protective jurisdiction and have those reports examined and documented by the Committee, or have the ability to debate protective jurisdiction at the Hague Conference. Two repercussions are particularly noteworthy. The first is that the nature and scope and application of protective jurisdiction under customary international law are little understood, as are the vital interests falling under its ambit. Nor was the applicability of protective jurisdiction over piracy given any consideration by the League. These matters came to be of great importance, ten years after the collapse of the League’s codification effort, when the ‘Allies’, in the aftermath of World War II, needed to use extraterritorial jurisdiction for the prosecution of persons belonging to the ‘enemy’ for the alleged commission of crimes against peace and war crimes; and, thereafter, the adoption of multilateral conventions in response to acts of terrorism and other transnational crimes. Secondly, it had implications for the ‘progressive development of international law and its codification’ by the League’s successor, the ILC, in 1949.¹¹⁵ Before examining the work of the ILC, however, it is important to consider the private effort made to codify jurisdiction in international law by the Harvard Research, which was the first study to systematise theories relating to grounds of jurisdiction under customary international law and to use the nomenclature ‘protective principle’ and provide a definition of it.

3.5. Harvard Research on International Law

Following the initiation of the League’s effort to codify international law and its call for

¹¹⁴ *Ibid.*, at p.243.

¹¹⁵ Statute of the ILC, 1947, adopted by A/RES 174(II) (21 November 1947), Articles 1 & 15.

a 'Conference on the Codification of International Law', the topic of jurisdiction was undertaken by the Third Phase of the 'Harvard Research on International Law', between 1932 and 1935, for the preparation of a 'Draft Convention on Jurisdiction with Respect to Crime' (Draft Convention).¹¹⁶ The League's Committee had, it will be recalled, concluded that an international convention on extraterritorial jurisdiction would 'encounter grave political and other obstacles'. Nevertheless, the Harvard Research thought that the topic should be explored in the hope that a Draft Convention on the topic would be of interest to and merit the attention of the League.¹¹⁷ The Harvard Research appointed Dickinson, as Rapporteur, to study grounds of jurisdiction in international law other than jurisdiction over piracy on the high seas, a point to which the present chapter shall return below. Protective principle jurisdiction is, according to the Harvard Research, 'claimed by most States, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence.'¹¹⁸ A fundamental difference between the report by Brierly under the auspices of the League and the Harvard Research is that the latter did examine State practice. On the basis of this practice, the Harvard Research defined the protective principle under Article 7 in the following way:

A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.¹¹⁹

The commentary to this Article stated that, with the exception of the theories of nationality and universality jurisdiction, 'legislation enacted in reliance upon the protective principle constitutes the most common extension of penal jurisdiction to offences committed abroad.'¹²⁰

The Harvard Research suggested that, with the exception of the U.S. and Britain, there was evidence of a 'high degree of uniformity' and 'almost universal approval' of protective jurisdiction in municipal laws, and that the divergence between those States which stress the territorial approach to jurisdiction and the majority of States which

¹¹⁶ Research on International Law under the Auspices of the Harvard Law School, Part II, 'Jurisdiction with Respect to Crime'. 29 *AJIL* (Supp.) (1935) 435.

¹¹⁷ See General Introduction, 23 *AJIL* (Spec. Supp.) 1 (1929), at p.9; General Introduction, 29 *AJIL* (Supp.) 1 (1935), at p.8.

¹¹⁸ *Supra* n 116, at p.445.

¹¹⁹ *Ibid.*, at p.543.

¹²⁰ *Ibid.*

make provision for extraterritorial jurisdiction as an exception to territoriality, as was suggested by Brierly, above, was not as wide as is generally assumed.¹²¹ The Harvard Research noted that the decision by the U.S. and Britain not to expressly extend their municipal law extraterritorially for the punishment of acts committed against their security and integrity is not evidence that those States perceived the protective principle to be contrary to international law.¹²²

The Harvard Research differed from Brierly's report in at least one further important respect by making it clear that the validity of protective jurisdiction in international law is beyond any doubt. For the Harvard Research, the controversy surrounding the principle is not over its validity but rather fear that its practical application may be subject to abuse.¹²³ In an effort to remove what were presumed by the Harvard Research to be the 'principal objections' by the U.S. and Britain, the Harvard Research proposed codifying the principle by agreement as to the acts which may be denounced as criminal.¹²⁴ As indicated by Article 7 of the Draft Convention, however, the Harvard Research ultimately took a different approach and defined the principle by reference to 'any crime' committed against the State's 'security, territorial integrity or political independence'. This approach appears to have as its aim, for the purpose of drafting a convention, a degree of certainty and specificity by defining more clearly the category of vital interests capable of falling under the principle's ambit, and thereby providing some limitation to the principle's scope and application; and, at the same time, it provides necessary flexibility by giving States sufficient discretion to define in their national laws the particular offences which may be committed against those vital interests. The Draft Convention also proposed *lex ferenda* the adoption of safeguards for the protection of human rights, including the exclusion from the principle's definition 'every act or omission that is committed in the exercise of a liberty by the law of the place that it was committed'.¹²⁵ The Harvard Research thought that this latter provision would prevent the potential abuse of protective jurisdiction by those States which are 'oversensitive about their prestige or security'.¹²⁶ It was recognised by the Harvard Research that qualifying protective jurisdiction in this way did not reflect existing State

¹²¹ *Ibid.*, at pp.446-447, 546, 549, 551, 557.

¹²² *Ibid.*, at p.546.

¹²³ *Ibid.*, at p.553.

¹²⁴ *Ibid.*, at p.556.

¹²⁵ *Ibid.*, at p.557.

¹²⁶ *Ibid.*

practice. Whatever were the objections of protective jurisdiction at that time by the U.S. and Britain, which are far from clear, the U.S. has since claimed just as extensive a jurisdiction.¹²⁷ Although it was not considered by the Harvard Research, protective jurisdiction has also traditionally developed over piracy in the practice of these States, to which the present chapter will now turn.

3.5.1. Article 9 of the Draft Convention: Jurisdiction over Piracy

The commentary to Article 7 of the Draft Convention, it will be recalled, stated that, with the exception of the theory of universal jurisdiction, ‘legislation enacted in reliance upon the protective principle constitutes the most common extension of penal jurisdiction to offences committed abroad’. It is notable that the Harvard Research followed the same approach to codification as the League and dealt with the matter of jurisdiction over piracy on the high seas under a wholly separate article of the Draft Convention and appointed a different Rapporteur, J.W. Bingham. Perhaps more importantly, the Harvard Research went one step further than did the League by seeking to codify, *lex ferenda*, the theory of ‘universality’ over a crime of piracy under international law elaborated by Moore.¹²⁸ It is useful to examine the treatment of jurisdiction over piracy by the Harvard Research in some depth, given that it has important implications for the historical and contemporary understanding of protective jurisdiction and its relationship with the theory of universality in international law.

The Harvard Research, by virtue of Article 9 of the Draft Convention, provides that ‘[a] State has jurisdiction with respect to any crime committed outside its territory by an alien which constitutes piracy by international law.’¹²⁹ According to the comment to Article 9, ‘[t]he principle is one of universality’, which is ‘everywhere recognised’.¹³⁰ On closer inspection of the preparatory work of Article 9, the report by Bingham was of the view that there exists over the international crime of piracy ‘a special, common basis of jurisdiction beyond the familiar grounds of personal allegiance, territorial dominion, dominion over ships, and injuries to the interests under the state’s protection’.¹³¹ The topic was approached by Bingham from the perspective of both *lex lata* and *lex ferenda*,

¹²⁷ See chapter four & Appendix A; also Blakesley, *supra* n 29, at p.56.

¹²⁸ *Supra* n 116, at p.563 (Article 9 and commentary).

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*, at pp.563-564.

¹³¹ Bingham, J.W. (Rapporteur) (1932). ‘Research in International Law IV: Piracy (Draft Convention Prepared for the Codification of International Law)’. 26 *AJIL (Supp.)* 743, at pp.757, 768.

in other words, of both codification and progressive development. This ‘special’ and ‘common’ basis of jurisdiction ‘over offences committed by foreigners against foreign interests’, which Article 9 of the Draft Convention eventually came to define as a theory of ‘universality’, was, in fact, regarded by Bingham as desirable for the purpose of proposing a Draft Convention *lex ferenda* and not because it reflected existing State practice.¹³² The same point applies, *mutatis mutandis*, to the Draft Convention’s reference to the applicability of universality over the offence of ‘piracy by international law’. Indeed, Bingham had found no evidence in State practice that piracy existed as a crime under international law, and was not able to define piracy under international law, due to ‘the chaos of expert opinion’ and the absence of any ‘authoritative definition’.¹³³

The basis on which Bingham founded this ‘special’ ground of jurisdiction was not State practice but, rather, reliance upon the argumentative commentaries of Anglo-American jurists. There is no attempt by Bingham to examine these writings critically or in any depth. What is more, none of the jurists relied upon by Bingham provide any evidence, by way of State practice, to support the theory of universal jurisdiction over piracy either.¹³⁴ One of these jurists was Moore, whose view was later repeated verbatim in Moore’s Dissenting Opinion in the *Lotus* case, to which reference has already been made above.¹³⁵ Moore, it will be recalled, defined jurisdiction over ‘piracy by the law of nations’ as a theory of ‘universal jurisdiction’, which Moore treated as ‘*sui generis*’ and the only exception to the territoriality of jurisdiction in international law. The reason why Moore defined jurisdiction over piracy as a theory of ‘universal jurisdiction’, it will be recalled, was due to an effort by Moore to distinguish between extraterritorial jurisdiction over piracy on the high seas, which had undeniably developed in the practice of Britain and the U.S., from extraterritorial jurisdiction in general international law over crimes occurring in another State’s territorial sovereignty, the latter of which Moore regarded as being contrary to international law. Thus, jurisdiction over piracy on the high seas was, according to Moore, exercised ‘in the interest of all’. The opinion of Moore was not supported by any evidence; rather, it was based, albeit implicitly, entirely on the previous academic commentary of Moore and the commentaries of other Anglo-American jurists, none of which provided any evidence of State practice in

¹³² *Ibid.*

¹³³ *Ibid.*, at pp.760, 769 and comment to Draft Article 3.

¹³⁴ *Ibid.*, at p.752.

¹³⁵ See Moore, *supra* n 7, at pp.951-952.

support of a theory of universal jurisdiction over piracy either. Nonetheless, given that Moore's treatise was regarded, at that time, as one of the most important American works on international law, and Moore's position as the Assistant Secretary of State and a serving judge on the PCIJ, the Harvard Research appears to have codified Moore's opinion with minimum critical analysis.

On the other hand and contrary to the opinion of Moore, Bingham acknowledged that '[m]any states do not undertake to punish a pirate who has not offended against its peculiar interests'.¹³⁶ Bingham went on to suggest that 'it is difficult to find cases of exercise of jurisdiction over piracy which could not be supported on one or more of the ordinary grounds', and observed '... the paucity of pertinent cases and of evidence of modern state practice [to support the theory of universal jurisdiction] ...'.¹³⁷ In fact, Bingham was unable to cite a single example of either historical or contemporaneous State practice in support of the theory of universal jurisdiction over piracy. While Bingham observed that '[o]nly through the voluntary action of some states are pirates seized, prosecuted, and punished', Bingham did not consider that the selective, 'voluntary action' by a handful of maritime powers was to secure their own trade routes and protect their own merchant shipping.¹³⁸ According to Bingham, the 'meaning' and 'practical legal significance' to be given to the traditional expression that piracy is an offence against the law of nations, beyond 'extravagant hyperbole', is 'the legal rule that every state participates in a common jurisdiction to capture pirates and their ships on the high sea'.¹³⁹ In this way, Bingham, as did Moore, appears to have made a great conceptual leap, from the right of 'every state' in international law to prescribe and enforce its jurisdiction on the high seas over so-called 'pirates' with the existence of a theory of 'universal', or - to use the words of Bingham - 'a common', jurisdiction.¹⁴⁰

It should, perhaps, be of little surprise that the theory of universal jurisdiction proved difficult for Bingham to reconcile with State practice. Accordingly, Bingham had to rationalise universality in rather tangential and even elusive terms, by proposing that States suppress piracy to 'prevent the growth' of a threat to the international

¹³⁶ *Supra* n 131, at pp.754-755.

¹³⁷ *Ibid.*, at pp.761 & 764 respectively.

¹³⁸ *Ibid.*, at pp.754-755.

¹³⁹ *Ibid.*, at p.757.

¹⁴⁰ *Ibid.*, at pp.759-760.

community¹⁴¹ and, ultimately, that piracy occurs on the high seas, ‘which engages the interest of the international community’.¹⁴² Notably, the Harvard Research adopted a different rationale to that of Bingham and in its commentary justified the inclusion of universality in Article 9 on the basis that piracy occurs ‘upon the seas where all have an interest in the safety of commerce and where no State has territorial jurisdiction’.¹⁴³ Notably, the commentary to Article 9 treated universal jurisdiction as if it already existed in State practice, by asserting that the ‘common interest and mutual convenience which gave rise to the [universality] principle have conserved its vitality’.¹⁴⁴

An alternative interpretation, and one which has already been explained in depth by the present author elsewhere, is that jurisdiction over ‘piracy’ is better understood under the protective principle, as defined by Article 7 of the Draft Convention. This interpretation of jurisdiction, which is supported by a wide range of primary sources, developed between the seventeenth and nineteenth centuries out of the necessity of the maritime powers to protect certain of their vital interests, not least their sovereign right to freely navigate the high seas, overseas trade routes and colonial trade and settlements, from so-called ‘pirates’.¹⁴⁵ The acts of these private armed vessels - or unlicensed privateers - amounted to the waging of unlawful warfare and could not be attributed to any recognised sovereign. As has already been explained in chapter two, the no nexus requirement, that is, the absence of any need to evidence a connection between a State prescribing its national laws over so-called ‘pirates’ on the high seas and - to use the words of Bingham - ‘threats against and injuries to interests under its protection’,¹⁴⁶ has nothing to do with a theory of ‘universal jurisdiction’. Rather, State practice has to be viewed in its proper historical context. State assertions of jurisdiction over piracy were restricted to unlicensed privateers on the high seas, which were, in effect, treated as ‘stateless’ vessels, falling outside the protection of any sovereign power. As the high seas were, as a fundamental principle under the emerging code of international law, treated as being beyond the exclusive sovereignty of any one State, it followed from another equally fundamental principle under international law - of sovereign equality and independence - that all sovereign States possessed an equal right, without having to

¹⁴¹ *Ibid.*, p.797-807.

¹⁴² *Ibid.*, p.808.

¹⁴³ *Supra* n 116, at p.566.

¹⁴⁴ *Ibid.*

¹⁴⁵ Garrod, *supra* n 3.

¹⁴⁶ *Supra* n 131, at pp.757-768.

provide any justification to each other, to prescribe and enforce jurisdiction over alleged pirates.¹⁴⁷ Indeed, for a State to do otherwise would have undermined, and even amounted to an implied diminution of, its own sovereignty, equality and independence. All that had to be established in national laws, or proven in inter-State disputes, was that alleged pirates operated on the high seas without a valid privateering licence. This meant that every maritime power possessed, in time of peace, a broad right under international law to assert prescriptive jurisdiction over pirates (private armed vessels on the high seas that lacked sovereign authority) and to enforce that jurisdiction over such vessels, in order to protect their vital interests. States did not, as a matter of international law, have to establish in their domestic laws evidence of a prescriptive connection with the accused or the alleged offence. This would suggest that, regardless of whether a State asserts jurisdiction over an alleged offence that is deemed to threaten its vital interests on the high seas or in the State's territorial sovereignty, the nature of that jurisdiction is one and the same; rather, the fundamental difference is the *locus delicti*.

Although it is beyond the scope of the present chapter, it is worth noting that the right of States to prescribe and enforce jurisdiction over alleged 'pirates' on the high seas in order to protect their vital interests - without the need to evidence a prescriptive connection with an alleged offence - is further illustrated by the attempt made by Britain to expand this right in the early nineteenth century to include the trade of slaves in order to protect its economic interests and the economic competitiveness of its plantation colonies.¹⁴⁸ Additionally, the U.S. has in recent years expanded the no nexus requirement over piracy to include foreign nationals aboard stateless vessels and foreign flag vessels (with the consent of the flag State) trafficking illicit drugs on the high seas. The consequence of this approach is that there is no need for the U.S. to establish that

¹⁴⁷ See also Report of Mr. Bayard, Secretary of State, to the President, case of Antonio Pelletier, 10th January 1887, Foreign Relations of the U.S., 1887, at p.604; *Le Louis*, *supra* n 101, at p.246; *Lotus*, *supra* n 7, p.69 (Diss. Op. Judge Moore).

¹⁴⁸ Speech of the British Foreign Minister, Lord Castlereagh, at the European Congress of Aix-la-Chapelle in 1818, in British and Foreign Papers, 1818-1819, Foreign Office, London, at p.79; *Le Louis*, *ibid.*, at p.235 (King's Advocate); Grewe, W.G., 'The Epochs of International Law' (trans. By Byers, M., Berlin: De Gruyter, 2000), at pp.556-567; Rubin, A.P. (1998). 'The Law of Piracy'. United States: Transnational Publishers, Inc., at pp.163, 219-220; Wheaton, H. (1845). 'History of the Law of Nations in Europe and America; From the Earliest Times to Treaty of Washington, 1842'. New York: Gould, Banks & Co., sects.33-34; Wilson, H.H. (1950). 'Some Principal Aspects of British Efforts to Crush the African Slave Trade, 1807-1829'. 44 *AJIL* 505, at p.511.

the drugs in question are destined for, or have any connection with, the U.S.¹⁴⁹ This no nexus requirement does not transform the jurisdiction of the U.S. into a theory of universality for the protection of international community values; rather, jurisdiction is to protect the sovereignty, security and governmental functions of the U.S.

In sum, the Harvard Research, in reliance on Anglo-American jurists, most notably, the commentary of Moore, misinterpreted the universal right of every State in international law to exercise jurisdiction over ‘piracy’ on the high seas - without having to evidence any prescriptive connection with an alleged offence - in order to protect certain of their vital interests, a number of which were shared by the international community, or at least among the maritime powers, and called it ‘universal jurisdiction’ by a different name. At a conceptual level, the Harvard Research conflated jurisdiction for the protection of ‘shared vital State interests’ with ‘international community values’. This misinterpretation is not merely of historical significance; it had a profound influence on the codification of international law by the ILC.

3.6. Codification of Extraterritorial Jurisdiction by the ILC

The way in which the League and the Harvard Research approached the codification of extraterritorial jurisdiction was relied upon by, and had important implications for, the first codification effort by the ILC at its First Session in 1949. The U.N. General Assembly instructed the U.N. Secretary-General to do the necessary preparatory work and undertake a survey of international law with a view to the selection of topics for codification by the ILC.¹⁵⁰ The ILC, based on a memorandum submitted by the Secretary-General, identified ‘Jurisdiction with regard to crimes committed outside national territory’ as one of fourteen areas of international law which it considered ‘necessary and desirable’ for codification.¹⁵¹ The preparatory work by the Secretary-General was not based on an examination of State practice; rather, it was limited to a review of the previous codification efforts by the League and the Harvard Research, the latter of which was regarded as being ‘of great value’.¹⁵² The consequence of this approach is that the Secretary-General assumed that the U.S. and Britain adhered to a

¹⁴⁹ 1986 Maritime Drug Law Enforcement Act, 46 U.S.C.A., paras.70501-70507. Murphy, S.D. (2003). ‘Extraterritorial Application of US Laws to Crimes on Foreign Vessels’. 97 *AJIL* 183; *U.S. v Cardales* 168 F.3d548 (1st Cir., 1999), at p.553; *U.S. v Vilches Navarrete*, 523 F.3d1 (1st Cir., 2008), at pp.21-22.

¹⁵⁰ A/RES/175(II) (21 November 1947).

¹⁵¹ ILCYB, 1949, vol.I, at pp.280-281.

¹⁵² U.N. Doc.A/GN.4/1/Rev.I, *supra* n 62, at pp.36-37.

strictly territorial approach to jurisdiction and therefore extraterritorial jurisdiction was described as requiring ‘clarification and authoritative solution’, not least because the protective principle is of a ‘controversial nature’ and is ‘not free from difficulty’.¹⁵³ It is apparent that the Secretary-General adopted the recommendation by Brierly, above, namely that the theory of objective territorial jurisdiction provides an alternative to extraterritorial jurisdiction.¹⁵⁴ In that regard, the Secretary-General suggested that the ILC may wish to attach importance to, and expansion of, the theory of territoriality and concluded that:

the question of the jurisdiction of States in the matter of offences committed by aliens abroad is of limited compass, and it is arguable that, in any scheme of codification, it ought to figure merely as a subdivision of a larger topic such as “Obligations and Limitations of Territorial Jurisdiction”.¹⁵⁵

Given that the preparatory work by the Secretary-General was limited almost exclusively to a review of the codification efforts by the League and the Harvard Research, it should, perhaps, be of little surprise that no consideration was given to the widespread development of protective jurisdiction in State practice over war crimes in the aftermath of World War II, or to the development and applicability of the principle over piracy on the high seas, which was treated by the Secretary-General under an entirely separate topic of ‘The Regime of the High Seas’.¹⁵⁶

The Secretary-General noted, as regards the selection of topics for codification, that a decision would have to be made by the ILC, in the first instance, ‘whether the topics selected shall cover limited and isolated branches of the law or whether the work of the Commission at any given period shall be devoted to a wider subject’. The Secretary-General suggested that, by way of example, the ILC would have to decide whether its work would ‘embrace isolated and disconnected questions such as prescription, jurisdiction over aliens for crimes committed abroad, piracy, and extradition’ or whether the policy shall be to limit work to specific aspects of one integrated subject, such as the law of the sea.¹⁵⁷ The ILC ultimately decided, and perhaps in light of the remarks by the Secretary-General, to focus on the latter approach to codification. Accordingly, rather

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*, at p.36.

¹⁵⁶ *Ibid.*, at pp.8, 40-42.

¹⁵⁷ *Ibid.*, para.104.

than codify grounds of extraterritorial jurisdiction, the ILC gave priority to the formulation of a 'draft Declaration on the Rights and Duties of States'¹⁵⁸ and the codification of other topics, most notably 'The Regime of the High Seas'.¹⁵⁹

As regards the latter topic, the Special Rapporteur and the ILC expressly relied exclusively and without question on the Harvard Research in the codification of the 1958 Geneva Convention on the High Seas.¹⁶⁰ However, neither the Special Rapporteur nor the ILC examined the development of jurisdiction over piracy in State practice; nor were they prepared to examine grounds of jurisdiction under custom and explain which of these grounds, if any, was codified by the convention *inter alia* in respect of piracy, or the interests or values that States are supposed to protect in the suppression of piracy.¹⁶¹ The only extent to which the Special Rapporteur was prepared to discuss jurisdiction over piracy was indirectly, stating that piracy is 'liable to prosecution by the authorities of any State, even if the interests of that State were not at stake.'¹⁶² This statement appears to have been taken directly from the Harvard Research and there is no further attempt by the Special Rapporteur to analyse it, or by the ILC to debate it. It will be recalled from the discussion above that States do not, as a matter of international law, have to evidence that their interests are 'at stake' in the prescription of their national laws over piracy on the high seas; that is fundamentally different from States prosecuting pirates where their interests are not 'at stake' at all, for which there is no evidence in support. Had the ILC examined State practice, then it may have realised that jurisdiction has developed over, and was applicable to, piracy for the protection of shared vital State interests.

The ILC, perhaps for the sake of expediency and pragmatism, and thus bypassing any disagreement or debate on grounds of jurisdiction, formulated a broad, discretionary and mutually beneficial rule, namely the right of 'every State' to exercise jurisdiction over piracy on the high seas.¹⁶³ The relevant draft article produced by the ILC stated that '[o]n the high seas or in any other place outside the jurisdiction of any State, every State

¹⁵⁸ A/RES/178(II) (21 November 1947); A/RES/375(IV) (6 December 1949); A/RES/596(VI) (1951).

¹⁵⁹ *Supra* n 151, at p.281.

¹⁶⁰ Convention on the High Seas, Geneva, 29 April 1958, 450 U.N.T.S. 11.

¹⁶¹ ILCYB, 1955, vol.I, at p.39, para.29; ILCYB, 1956, vol.II, at pp.253, 282.

¹⁶² *Ibid.*, para.30.

¹⁶³ See also *supra* n 62, para.10.

may seize a pirate ship'.¹⁶⁴ This wording was codified by the Geneva Convention on the High Seas, which was repeated, once again without question, by the 1982 U.N. Convention for the Law of the Sea.¹⁶⁵ There is no evidence, based on the ILC's records, to suggest that the ILC intended to pre-empt the codification of grounds of jurisdiction under customary international law which were, at that time, unclear, or codify any one particular ground of jurisdiction over piracy. Nonetheless, the priority given by the ILC to the codification of jurisdiction over piracy and, to that end, the reliance placed on the Harvard Research, has led to the widespread suggestion that the ILC codified a ground of universal jurisdiction that has been developing in customary international law for the past 500 hundred years.¹⁶⁶

The ILC also considered, at its First Session, whether, in the light of widespread practice in the aftermath of World War II, the 'laws of war' and the punishment of war crimes should be selected as a topic for codification. The majority of the ILC declared itself opposed to the study of this topic at that time.¹⁶⁷ The reason for this decision was that the codification of this topic, at the outset of the work by the ILC, might be interpreted by public opinion 'as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace'.¹⁶⁸ Thus, the ILC was not willing to study extraterritorial jurisdiction over war crimes and other crimes under international law, including in the formulation by the ILC of 'principles recognised in the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'.¹⁶⁹ The decision by the ILC not to codify jurisdiction over war crimes has led

¹⁶⁴ ILCYB, 1956, *supra* n 161, at p.283.

¹⁶⁵ Convention on the High Seas, *supra* n 160, Article 19; U.N. Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 U.N.T.S. 3, Article 105.

¹⁶⁶ E.g., *Arrest Warrant*, *supra* n 15, at pp.79, 81 (J. Sep. Op. Judges Higgins *et al.*); *ibid.*, at pp.37-38 (Sep. Op. Judge Guillaume); *ibid.*, at p.55 (Dec. Judge Ranjeva); *ibid.* (Sep. Op. Judge Koroma); S/RES/1976 (14 April 2011), preambular para.8 & operative para.14; Huang, *supra* n 60, at p.624; U.N. Doc.A/65/181 (2010), para.27; Akehurst, M. (1972). 'Jurisdiction in International Law'. 46 *BYIL* 145, at p.160; Gardner, M. (2012). 'Piracy Prosecutions in National Courts'. 10 *JICJ* 797, at pp.802, 804-805; Guilfoyle, D. (2009). 'Shipping Interdiction and the Law of the Sea'. Cambridge: CUP, at p.43 & chapter 4; Macedo, S. (ed.) (2001). 'The Princeton Principles on Universal Jurisdiction'. Princeton: New Jersey, at p.45; O'Keefe, R. (2002). 'Customary International Crimes in English Courts'. 72 *BYIL* 293, at p.297; Randall, K.C. (1987-1988). 'Universal Jurisdiction under International Law'. 66 *Tex.L.Rev.* 785, at pp.791-793; Scharf, M.P., 'Jurisdiction with Respect to Crime: Universal Jurisdiction and the Harvard Research', in Grant, J.P. & Barker, J.C. (eds.) (2007). 'Harvard Research in International Law: Contemporary Analysis and Appraisal'. Buffalo: William S. Hein & Co., Inc., at p.276, 283-284; Treves, T., 'Piracy and the international law of the sea', in Guilfoyle, D. (ed.) (2013). 'Modern Piracy. Legal Challenges and Responses'. Cheltenham: Edward Elgar, at pp.121-122.

¹⁶⁷ *Supra* n 151, at p.281.

¹⁶⁸ *Ibid.*

¹⁶⁹ A/RES/177(II) (21 November 1947).

to the widespread suggestion by courts and in legal scholarship that a theory of universal jurisdiction expanded over piracy to include war crimes and other crimes under international law in order to protect international community values.¹⁷⁰

As has already been explained in depth by the present author elsewhere, by analysing a wide range of primary sources, the jurisdiction that developed out of the prosecution of thousands of alleged war criminals in Europe and the Far East, and the creation of International Military Tribunals at Nuremberg and Tokyo, is capable of an alternative interpretation. This jurisdiction appears to have been based on the protective principle, which developed out of the need by the ‘Allies’, each of whom had been injured by violations of the laws and customs of war, to protect certain of their vital interests by persons belonging to the ‘enemy’.¹⁷¹ Such interests appear to be shared by the international community and include, for example, the State’s sovereignty, political independence, security, nationals and armed forces. To that end, jurisdiction was even exercised by some of the Allies collectively, over war crimes committed against the nationals of other Allied nations and a crime against peace in one and the same war, in order to protect each other’s vital interests from a ‘common enemy’.¹⁷²

3.7. Concluding Remarks

This chapter has shed important light on the modern historical development of protective jurisdiction, and examined the public and private efforts made to codify this jurisdiction in the first half of the twentieth century. As has been explained, protective jurisdiction has developed over domestic and international crimes for the protection of certain shared vital State interests. These interests, which are no less vital today, included the State’s ‘internal’ and ‘external’ security, sovereignty, political independence, territorial integrity, Head of State and public officials, currency and official documents, overseas trade routes and shipping and armed forces.

¹⁷⁰ E.g., *Eichmann*, *supra* n 62, at pp.293-300; Randall, *supra* n 166, at pp.802-810; Scharf, *supra* n 166, at pp.278-279; *Prosecutor v Tadić*, Case No.IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995), para.57; *Prosecutor v Furundzija*, Case No.IT-95-17 (10 December 1998), paras.147, 156; *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2002] 1 A.C. 147, at p.275 (Lord Millett); Kreß, C. (2006). ‘Universal Jurisdiction over International Crimes and the *Institut de Droit International*’. 4 *JICJ* 561, at pp.566, 568, 573-576.

¹⁷¹ Garrod, *supra* n 4; also Röling, B.V.A. (1960). ‘The Law of War and the National Jurisdiction since 1945’. 100 *Recueil des Cours* 323, at pp.355-377.

¹⁷² *Ibid.*

Grounds of jurisdiction and the way which they have developed in State practice, including protective jurisdiction, have traditionally been little understood and, more often than not, subject to considerable confusion. This is best illustrated, perhaps, by the landmark case of *Lotus* before the PCIJ. It will be recalled that a small number of States expanded protective jurisdiction to include, without any apparent limitation, offences committed abroad that were deemed harmful to their own nationals. The PCIJ in that case affirmed the validity in international law of ‘principles’ of extraterritorial jurisdiction, though it did not examine or explain what these ‘principles’ were, at that time, or distinguish protective jurisdiction from jurisdiction over relatively minor offences committed abroad against the State’s nationals under the more controversial ‘passive personality’ principle.¹⁷³ The PCIJ and the Dissenting Opinions in that case exhibit, at best, a limited and, at worst, confused understanding of grounds of extraterritorial jurisdiction and protective jurisdiction in particular. The PCIJ thus missed an important opportunity to provide some important clarification on grounds of jurisdiction under customary international law. This is not merely of historical significance. The *Lotus* case was the only opportunity for an international court to pronounce on grounds of jurisdiction in the twentieth century and provide some authoritative guidance to States. It is worth noting, by way of aside, that this has led, in part, to the relationship between protective jurisdiction and the theories of passive personality and universal jurisdiction to become confused in recent years by courts and in legal scholarship.¹⁷⁴

The need for the clarification and systematisation of extraterritorial jurisdiction under customary international law through a process of codification was recognised by the League of Nations. However, the League limited itself to the selection of subjects for codification by means of an international convention. This is important in view of the report by Brierly, acting as Rapporteur. The opinion of Brierly, which was typical of that held by Anglo-American jurists at that time, regarded the exercise of protective jurisdiction over crimes occurring in the territory of States as contrary to international law because it constituted a violation of their sovereignty and internal affairs. Anglo-American jurists thus favoured an absolute territorial approach to jurisdiction in

¹⁷³ *Supra* n 7, at p.19.

¹⁷⁴ E.g., *Arrest Warrant*, *supra* n 15, para.47 (J. Sep. Op. Judges Higgins *et al.*); *ibid.*, para.5 (Sep. Op. Judge Rezek); *ibid.*, paras.4, 5 & 12 (Sep. Op. President Guillaume); *Eichmann*, *supra* n 62, at p.304; *Attorney-General of the Government of Israel v Adolf Eichmann*, 36 ILR 5 (District Court, 12 December 1961), at pp.49-57. See further chapter five.

international law, and they assumed that the U.S. and Britain strictly adhered to this approach and opposed any exceptions to it. As has been explained, this view was unfounded and incorrect. Nonetheless, the League decided that codification of this topic, ‘although desirable, would encounter grave political and other obstacles’ and other subjects were given priority.¹⁷⁵

The report by Brierly was based exclusively on secondary sources by Anglo-American commentators and, although it is not expressly acknowledged as such, the commentary of Moore. Moore was one of the most influential Anglo-American jurists in the early twentieth century and his academic commentary was later repeated by Moore in his judicial capacity serving on the PCIJ in the *Lotus* case. As has been shown, the Dissenting Opinion of Moore in that case conflated protective jurisdiction *stricto sensu* with the more controversial theory of passive personality jurisdiction and treated them as one and the same, in order to dismiss the former’s validity. In a further effort to dismiss the validity of protective jurisdiction, Moore made a distinction between extraterritorial jurisdiction over piracy on the high seas, which had undeniably developed in the practice of Britain and the U.S., from extraterritorial jurisdiction in general international law over crimes occurring in another State’s territorial sovereignty. In the case of the former, Moore elaborated an entirely new theory of ‘universal jurisdiction’ over a crime of ‘piracy by the law of nations’.¹⁷⁶ To that end, Moore suggested that jurisdiction over piracy, as the only exception to territoriality, is restricted to the high seas - outside the exclusive sovereignty of any State - and is exercised ‘in the interest of all’.¹⁷⁷ More fundamentally, Moore misinterpreted the universal and equal right under international law of all independent States to exercise jurisdiction over piracy on the high seas in order to protect certain of their vital interests, a number of which are shared by the international community, most notably the State’s sovereignty and independence and the sovereign right to navigate the high seas and overseas trade routes and colonial trade and shipping, with a theory of universal jurisdiction. The ‘interest of all’ alluded to by Moore was, at best, incidental to the protection of these vital interests. This may explain the reason why Moore was not able to explain the international community values that States did, or were supposed to, protect in exercising ‘universal jurisdiction’ over piracy. It is worth noting, by way

¹⁷⁵ *Supra* n 74, at p.253.

¹⁷⁶ *Supra* n 7, at pp.69-71.

¹⁷⁷ *Ibid.*

of aside, that the PCIJ and none of the other Dissenting Opinions in the *Lotus* case recognised a theory of ‘universal jurisdiction’ over piracy.

The opinion of Moore had a profound influence on the efforts made by the Harvard Research and the ILC to codify protective jurisdiction. The Harvard Research adopted the same approach to codification as the League and limited itself to the adoption of a draft international convention. Thus, the Harvard Research defined protective jurisdiction in fairly narrow terms, namely the protection of the State’s security, territorial integrity and political independence. The other reason for doing so was to overcome the supposed divergence between the two groups of States identified by Brierly and reduce potential resistance to the adoption of such a convention, given that few States would object to the right to protect such interests. On the other hand, the Harvard Research dealt with jurisdiction over piracy on the high seas under a wholly separate draft article and went one step further than did Brierly by codifying, *lex ferenda*, the theory of ‘universality’ over a crime of piracy under international law elaborated by Moore.¹⁷⁸ As has been explained, the Harvard Research was not able to cite a single example of State practice in support of universal jurisdiction over piracy and the way in which this theory was rationalised did not reflect the way in which jurisdiction has developed over piracy.

The way in which the League and the Harvard Research approached codification influenced the League’s successor, the ILC, at its First Session. The ILC ultimately decided to adopt a fragmented approach to codification and gave priority to other topics, one of which was jurisdiction over piracy on the high seas under the ‘The Regime of the High Seas’.¹⁷⁹ In the codification of this latter topic, the ILC relied exclusively and without question on the Harvard Research. At the same time, the ILC did not examine grounds of jurisdiction or specify which of these grounds, if any, it intended to codify. Nor did the ILC explain what vital State interests or international community values States were supposed to protect. It would have been odd, perhaps, for the ILC to codify one particular ground of extraterritorial jurisdiction given that the grounds of jurisdiction which existed under custom, at that time, was unclear and had not yet been examined by the ILC. The majority of the ILC also declared, at its First Session, opposed to the study of the ‘laws of war’ at that time.

¹⁷⁸ *Supra* n 116, at p.563.

¹⁷⁹ *Supra* n 151, at p.281.

The upshot of all this is that grounds of jurisdiction under customary international law and protective jurisdiction in particular have not been clarified and codified by the League and the ILC, let alone debated and the views of governments exchanged. Nor has the development and applicability of protective jurisdiction over piracy and war crimes been examined by the ILC. The absence of an instrument codifying jurisdiction has resulted in protective jurisdiction being perceived, in the words of the U.N. Secretary-General, above, as a topic of ‘controversial nature’ and in need of ‘clarification’ and ‘authoritative solution’.¹⁸⁰

The first codification effort by the ILC raises two broader implications of great importance for the present study. The first relates to the fragmented approach to codification. The decision by the ILC to prioritise the codification of jurisdiction contained in the special legal regime governing piracy on the high seas had the effect, perhaps inadvertently, of formally entrenching the jurisdictional dichotomy over crimes under domestic and international law first developed by Moore and subsequently codified *lex ferenda* by the Harvard Research. That is, extraterritorial jurisdiction over an international crime of piracy on the high seas is, to borrow the words of the Secretary-General, above, ‘isolated and disconnected’ to the question of protective jurisdiction over domestic crimes.¹⁸¹ Thus, protective jurisdiction tends to be not only little understood but interpreted in narrow terms (confined to domestic crimes) by courts and in legal scholarship.¹⁸²

Second, the priority given by the ILC to the codification of jurisdiction over piracy and, to that end, the reliance placed on the Harvard Research has given rise to a collective belief. This belief, to which reference has already been made in chapter one, has developed out of haphazard analyses of State practice and the overreliance on tentative, secondary sources of evidence of customary international law. It posits that universal jurisdiction has for the past 500 years developed over an international crime of piracy as a customary rule in order to protect international community values and that this theory of jurisdiction was codified by the ILC. Moreover, according to this belief, the protection of such values based on universal jurisdiction expanded in the aftermath of World War II from piracy to encompass war crimes and other crimes under

¹⁸⁰ U.N. Doc.A/GN.4/1/Rev.I, *supra* n 62, at pp.36-37.

¹⁸¹ *Ibid.*, para.104.

¹⁸² See chapters one and six.

international law.

Contrary to this collective belief, this chapter has suggested that the supposed development of a customary rule of universal jurisdiction over piracy and war crimes simply does not provide for an adequate explanation of State practice. The collective belief *inter alia* provides a useful example of the reason why the ILC decided in 2012 to include in its programme of work the formation and sources of evidence of customary international law.¹⁸³ A more persuasive theory underlying such practice is that jurisdiction developed over these crimes for the protection of certain shared vital State interests. Notwithstanding the confusion surrounding the origins of universal jurisdiction, this ground of jurisdiction is widely recognised by States today and its legality is beyond question. That said, the finding by the present chapter has important implications for the way in which the concept of universal jurisdiction is currently understood and the type of international community values that may be protected by such jurisdiction. This is of great importance for the following reason: according to the collective belief *inter alia*, regardless of the way in which jurisdiction has traditionally developed over piracy and war crimes, since the adoption of the 1949 Geneva Conventions, more than sixty treaties, including counter-terrorism treaties, that utilise the obligation to extradite or prosecute have impliedly codified a ground of universal jurisdiction for the protection of international community values.¹⁸⁴

It will be recalled from chapter one that the present study has suggested that the prescriptive jurisdiction arising out of extradite or prosecute in counter-terrorism treaties should not automatically be interpreted as a ground of universal jurisdiction; rather, this prescriptive jurisdiction is equally capable of being interpreted as a form of protective jurisdiction, albeit one deriving from treaty rather than custom, for the protection of certain vital interests shared by the States parties. The comments and statements made during the debate on universal jurisdiction by the U.N. General Assembly, which has been on-going since 2009, shows that the relationship between universal jurisdiction and extradite or prosecute, and the international community values that may be protected by universal jurisdiction, are far from clear and subject to considerable

¹⁸³ See chapter six.

¹⁸⁴ See also Yee, S. (2011). 'Universal Jurisdiction: Concept, Logic and Reality'. 10 *Chinese JIL* 503, para.17.

confusion.¹⁸⁵ Thus, there is a need to examine the relationship between the obligation to extradite or prosecute and universal jurisdiction and, for the purpose of conceptual clarity among grounds of jurisdiction, consider the extent to which international community values may be protected by extradite or prosecute and make a fundamental distinction between such values and ‘shared vital State interests’. This distinction is discussed in depth in chapter five.

The confusion that has traditionally attended grounds of jurisdiction under custom and the need for greater clarification would suggest that the codification of protective jurisdiction is not only timely but also necessary and desirable more than ever before. This has recently been recognised by the ILC in the inclusion of the topic of ‘Extraterritorial jurisdiction’ in its long-term programme of work and is discussed in chapter six.¹⁸⁶ It is useful first, in chapter four, to undertake empirical research into contemporary State practice in order to determine whether, and, if so, to what extent, protective jurisdiction has been used in response to international terrorism.

Theories relating to grounds of extraterritorial jurisdiction in contemporary customary international law are little understood and often subject to confusion, and protective jurisdiction is no exception. One of the reasons accounting for this is that the protective principle, as with other grounds of jurisdiction, has yet to be codified. The issue of whether it is possible to define the protective principle and, if so, the form that this ought to take, has remained contested in legal scholarship since the efforts were made to codify extraterritorial jurisdiction by the League of Nations.¹⁸⁷ There is thus a lack of clarity and certainty on the definition of protective jurisdiction, but also its scope and application, in contemporary international law.

¹⁸⁵ Letter dated 29 June 2009 from the Permanent Representative of the United Republic of Tanzania to the U.N. addressed to the U.N. Secretary-General, U.N. Doc.A/63/237/Rev.1 (23 July 2009); U.N. General Assembly, Sixty-third session, U.N. Doc.A/63/PV.105 (14 September 2009); A/RES/64/117 (16 December 2009); U.N. Doc.A/65/181 (2010), paras.15, 21-22; Sixth Committee, U.N. Doc.A/C.6/64/SR.12 (20 October 2009), paras.19, 48, 59, 66, 71, 82, 90, 95, 96; *ibid.*, U.N. Doc.A/C.6/64/SR.13 (21 October 2009), paras.1, 3-4, 13, 18, 23; *ibid.*, U.N. Doc.A/C.6/65/SR.10 (13 October 2010), paras.56, 57, 71, 78; *ibid.*, U.N. Doc.A/C.6/65/SR.11 (13 October 2010), paras.10, 14, 17, 25, 27, 40, 49; *ibid.*, U.N. Doc.A/C.6/65/SR.10 (3 November 2010), para.60; *ibid.*, U.N. Doc.A/C.6/65/SR.12 (15 October 2010), paras.9, 13-14, 19, 24, 27-29, 30, 34; *ibid.*, U.N. Doc.A/C.6/66/SR.12 (12 October 2011), paras.4, 7, 17-18, 27, 34, 47, 53, 59, 62, 72-73; *ibid.*, U.N. Doc.A/C.6/66/SR.13 (30 November 2011), paras.5, 11, 13, 15-19, 21, 24, 28, 39, 41, 43, 48, 52, 58, 61; *ibid.*, U.N. Doc.A/C.6/66/SR.26 (7 December 2011), paras.10, 18, 24, 42, 64; *ibid.*, U.N. Doc.A/C.6/66/SR.27 (8 December 2011), paras.41, 64, 81).

¹⁸⁶ U.N. Doc.A/61/10 (2006), Chapter XIII, paras.257, 260.

¹⁸⁷ Chapter three.

Chapter Four

‘Protective Jurisdiction in State Practice for Combating International Terrorism: An Empirical Analysis’

4.1. Introduction

The threat of international terrorism, in particular following the terrorist attacks on 11 September 2001 - whereby four aircraft on internal flights were seized by foreign nationals, two of which were crashed into the World Trade Centre in New York and another into the Pentagon, Washington, D.C., - has precipitated an unprecedented legislative response by States. This response has been described variously in legal scholarship as ‘legislative wildfire’,¹ ‘legislative flurry’² and even a ‘legislative overreaction’.³ Nonetheless, the enactment by States of domestic laws for combatting the threat has largely been encouraged, if not demanded, by the equally unprecedented ‘rush to law’ by the U.N. Security Council in the form of resolution 1373, which was adopted unanimously by the Council under Chapter VII of the U.N. Charter in the immediate aftermath of 9-11.⁴ Resolution 1373 requires all States to take a number of wide-ranging steps necessary to combat international terrorism; these include, for example, the adoption of national laws criminalising ‘terrorist acts’; to ‘prevent and suppress terrorist acts’, including by fully implementing international treaties relating to acts of terrorism; and to ‘[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in the supporting of terrorist acts is brought to justice’, including where such acts occur abroad.⁵ The resolution also makes provision for the establishment of a Counter-Terrorism Committee (CTC), whose duties include the monitoring of compliance with the resolution’s provisions and to

¹ Zelman, J.D. (2001). ‘Recent Developments in International Law: Anti-Terrorism Legislations—Part One: An Overview’. 11 *Transnat’LL.&Pol’y* 184.

² Lynch, A. ‘The Tenacity of Bad Law: Why Anti-Terrorism Laws Proliferate and Persist’. Paper presented at Workshop 6—The rule of law in an age of terrorism. VIIIth World Congress of International Association of Constitutional Law, Mexico, 6-10 December 2010.

³ Samuel, K.L.H. & White, N.D. & De Friás, A.M.S. (eds.) (2012). ‘Report of Key Findings and Recommendations on the Rule of Law and Counter-Terrorism’. Multi-National Counter-Terrorism Expert Network, at p.37.

⁴ S/RES/1373 (28 September 2001). See also Barker, J.C. (2007). ‘The Politics of International Law-Making: Constructing Security in Response to Global Terrorism’. 3 *J.Int’LL.&Int’lRel.* 5; Warbrick, C. & McGoldrick, D. & Katselli, E. & Shah, S. (2003). ‘September 11 and the UK Response’. 52 *ICLQ* 245.

⁵ S/RES/1373, *ibid.*, preambular para.7 & operative paras.1, 2(b), 2(e), 3(c)-(e).

which States are to report periodically the actions that they have taken to combat international terrorism.⁶

The legislative response has comprised a process of utilising existing general laws, which are not limited to ‘terrorism’, and the updating of national legal frameworks by providing for new offences and/or the introduction of amendments to existing penal codes, including special ‘terrorism’ offences. This constitutes a potentially substantial and widespread body of State practice. Yet it has tended to be overshadowed in legal scholarship by the Security Council’s rush to law and therefore has, to date, been given little consideration.

The purpose of this chapter is to examine this legislative response in order to provide an original, empirical analysis of protective jurisdiction in contemporary State practice; in particular, it aims to assess whether, and, if so, to what extent, this jurisdiction has been used for combatting the threat of international terrorism. It does so by drawing upon a wide range of primary sources.⁷ A comprehensive study of State practice, it has to be stressed from the outset, is of the scale that would undoubtedly require work to be undertaken by the International Law Commission (ILC). Incidentally, this has recently been recommended by the ILC’s Secretariat and endorsed by the ILC in the inclusion of the topic of ‘Extraterritorial jurisdiction’ in its long-term programme of work.⁸ The time may therefore be ripe, more than ever before, to shed new and important light on protective jurisdiction by examining whether, and, if so, to what extent, States use the principle, and also the type of offences which have been included under its ambit.

There are two further reasons for providing empirical research into State practice. The first of these, as has already been explained in chapters one and three, is that there is no contemporary study, either public or private, that has examined protective jurisdiction in State practice.⁹ The principle is also little understood and tends either to be overlooked or defined in overly-narrow terms by courts and in legal scholarship.¹⁰ Some

⁶ *Ibid.*, para.6.

⁷ *Infra* at pp.10-12.

⁸ U.N. Doc.A/61/10 (2006), Chapter XIII, paras.257, 260; *ibid.*, ‘Extraterritorial jurisdiction’, Annex E.

⁹ *Cf. infra* n 31.

¹⁰ E.g., Akande, D., “‘The Protective Principle’”; “‘The Active Nationality Principle’”; “‘The Passive Personality Principle’”; “‘The Territoriality Principle’”, in Cassese, A. *et al.* (eds.) (2009). ‘*Oxford Companion to International Criminal Justice*’. Oxford: OUP, at p.474.

commentators have gone as far as to question its validity in international law.¹¹ The use of protective jurisdiction for combating international terrorism has also been given insufficient attention in legal scholarship and requires further examination. The latter point is best exemplified, perhaps, by the commentary of Simma and Müller, who have suggested that:

[i]n the post-2001 atmosphere where ‘security’ appears to have become to some a catch-all concept, a sweeping application of the protective principle may present itself as highly opportune, but this is far from being a commonly accepted position.¹²

The distinguished authors provide no empirical evidence in support of this finding.

Secondly, grounds of jurisdiction have, since the Harvard Research, been confused, and there appears to be some uncertainty as to which of these grounds is the most appropriate for combatting international terrorism. It has been suggested by some courts and commentators that international terrorism is, or should be, transformed into a crime under international law and, in turn, subject to universal jurisdiction.¹³ The idea that ‘terrorism’ is, or may be, treated as an international crime, however, does not appear to have been accepted by the vast majority of States. The comments and observations submitted by States to the debate on universal jurisdiction by the U.N. General Assembly shows that there is a lack of agreement as to what crimes are subject to universal jurisdiction, and the reasons why, and there is certainly insufficient agreement that acts of terrorism are, or should be, subject to universal jurisdiction.¹⁴ In any case, as has been explained by the present author elsewhere, the treatment of conduct as criminal

¹¹ Kontorovich, E. (2008). ‘The Inefficiency of Universal Jurisdiction’. 1 *U.Ill.L.Rev.* 390, at p.394.

¹² Simma, B. & Müller, A.T., ‘Exercise and Limits of Jurisdiction’, in Crawford, J. & Koskeniemi, M. (2012). ‘The Cambridge Companion to International Law’. Cambridge: CUP, at p.144.

¹³ E.g., Special Tribunal for Lebanon (Appeals Chamber), Interlocutory Decision on the Applicable Law, *Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/1, 16 February 2011, paras.83, 84, 86, 91 & n 134; Cassese, A. (2001). ‘Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law’. 12 *EJIL* 993, at p.994; Samuel *et al.*, *supra* n 3, at p.42; Saul, B. (2006). ‘Defining Terrorism in International Law’. Oxford: OUP, at pp.7, 262, 269; Saul, B., ‘Criminality and Terrorism’, in De Friás, A.M.S. & Samuel, K.L.H. & White, N.D. (eds.) (2012). ‘Counter-Terrorism International Law and Practice’. Oxford: OUP, at p.136.

¹⁴ U.N. Doc.A/65/181 (2010); U.N. Doc.A/66/93 (2011). Cf. Sixth Committee, ‘Observations by Belgium on the scope and application of the principle of universal jurisdiction’ (2010), para.16; *ibid.*, ‘The scope and application of the principle of universal jurisdiction: information provided by Spain’ (2011), para.2.

under international law does not mean that such conduct is *ipso facto* subject to universal jurisdiction.¹⁵

On the other hand, it has been suggested by a number of States and courts, as well as in legal scholarship, that the obligation to extradite or prosecute, a principle contained in the provisions of more than 60 treaties, including treaties relating to international terrorism, impliedly codifies or embodies a theory of universal jurisdiction and requires States parties to the relevant treaties to make provision in their national laws for universal jurisdiction over treaty crimes.¹⁶ As will be explained below, and in greater depth in chapter five, the use of extradite or prosecute in counter-terrorism treaties, the provision for which in national laws has also been made mandatory by the Security Council, starting with resolution 1373, should not automatically be interpreted as codifying a theory of universal jurisdiction. Rather, the principle, and the prescriptive jurisdiction arising out of it, is capable of being interpreted as a mutually beneficial means by which States whose vital interests are threatened by acts of terrorism are able to obtain the custody of the accused, or, failing extradition, have the accused prosecuted on their behalf.

The chapter concludes that, notwithstanding the different and divergent ways in which ‘terrorism’ and other substantive crimes are defined in national laws, protective jurisdiction not only appears to be widely used in State practice but has been at the heart of legislative response to, and is the principal means by which States combat, the threat of international terrorism. This practice, which may be attributable, at least in part, to resolution 1373, may be sufficiently uniform and widespread so as to support the finding that such jurisdiction is a rule of customary international law and to permit codification. The Security Council has obliged States to make provision for extraterritorial jurisdiction in the implementation of resolution 1373 but has not defined ‘terrorism’ and has remained silent on grounds of jurisdiction. Thus, the codification of protective jurisdiction and the creation of a clearer and more coherent jurisdictional

¹⁵ Garrod, M. (2012). ‘The Development of Protective Principle Jurisdiction over War Crimes and the Hollow Concept of Universality’. 12 *ICLR* 763.

¹⁶ E.g., U.N. Doc.A/65/181, paras.21-22; U.N. Doc.A/66/93 (2011), paras.121-128; *U.S. v Layton*, 509 F.Supp.212 (N.D.Cal., 1981), at pp.221-224; *U.S. v Yunis*, 924 F.2d1086 (D.C. Cir., 1991), at p.1092; *U.S. v Bin Laden*, 92 F. Supp.2d.189 (S.D.N.Y., 13 March 2000), at pp.215-221; Mexico, Supreme Court, *Cavallo Case*, No.14012002, 10 June 2003; Council of the European Union, The AU-EU Expert Report on the Principle of Universal Jurisdiction, Doc. 8672/1/09, REV 1 (16 April 2009), para.11; ALI, Restatement of Foreign Relations Law of the U.S. (Third), Washington, D.C. (1987), para.404.

framework, in order to guide States and ensure sufficient uniformity and complementarity in national laws and, to that end, to enhance inter-State cooperation, may be more necessary and desirable than ever before.

The chapter begins, in part two, by providing an overview of existing studies on protective jurisdiction, in order to place the present chapter in context and to illustrate its value and importance. Thereafter, in part three, the chapter explains the methodology used to collect primary sources of data, namely national laws, and its limitations, as well as the way in which the data are interpreted. Part four presents the key findings of a detailed empirical analysis of national laws and lists the number of States that have made provision for protective jurisdiction. It also makes an effort to systematise offences, where they appear to be of a similar subject-matter, over which the principle has been used in national laws, with the aim of identifying broader trends in State practice. The chapter then examines, in part five, the practice of the Security Council in response to international terrorism, in particular, its adoption of resolution 1373. As will be explained, this resolution requires States to make provision in their national laws for extraterritorial jurisdiction in order to combat the threat of international terrorism and may be attributable, at least in part, to the trend in State practice. The chapter then discusses, in part six, the role of the CTC, which is, in effect, a committee of the whole of the Security Council, and the prioritisation of the obligation to extradite or prosecute in the national implementation of resolution 1373.

4.2. Existing Studies of Protective Jurisdiction

In order to place the present work in context, and to illustrate its value and importance, it is useful to consider existing studies of protective jurisdiction. Since the publication by the Harvard Research in 1935 of a ‘Draft Convention on Jurisdiction with Respect to Crime’, which, it will be recalled, found a ‘high degree of uniformity’ and ‘almost universal approval’ of the protective principle in municipal laws, there has not been a comprehensive study of this jurisdiction in State practice.¹⁷ Although the Harvard Research has had a profound influence on the understanding of theories relating to grounds of jurisdiction by States and courts, as well as in legal scholarship, and continues to be cited as an authoritative source, nonetheless, it is largely, if not wholly,

¹⁷ Research in International Law Under the Auspices of the Faculty of the Harvard Law School, ‘Jurisdiction with Respect to Crime’, 29 *AJIL (Spec. Supp.)* 435 (1935) (Harvard Research).

out of date. The Harvard Research is also subject to an important shortcoming in that it appears to have misinterpreted jurisdiction for the protection of ‘shared vital State interests’ as a theory of universal jurisdiction for the protection of ‘international community values’.¹⁸

4.2.1. Distinguishing between the ‘Protective’ and ‘Effects’ Principles of Jurisdiction

The publication in 1987 of the ‘Restatement (Third) of Foreign Relations Law of the United States’ by the American Law Institute (ALI), the successor of the Harvard Research, defined protective jurisdiction as permitting a State to ‘safeguard a limited class of state interests’, namely offences ‘directed against the security of the state or other offenses threatening the integrity of governmental functions’.¹⁹ The range of offences which the Restatement regarded as capable of falling within the ambit of this jurisdiction include ‘espionage, counterfeiting of the state’s seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws.’²⁰ Although the Restatement has been described as ‘the most comprehensive, contemporary statement of international law’, and that its ‘views carry considerable weight with Congress and the courts’,²¹ the definition of protective jurisdiction by the Restatement is based on the perspective of U.S. practice. That said, it does not reflect accurately, and is even at variance, with U.S. practice; nor does it represent an accurate reflection of international law.²²

Perhaps more fundamentally, the drafters of the Restatement misunderstood protective jurisdiction. Indeed, the Restatement suggested that the so-called ‘effects’ principle permits a State to prescribe its domestic law over conduct abroad that ‘is *intended* to have substantial effects within its territory’.²³ This blurs the distinction between the effects and protective principles and makes the former - which is an expansion of the theory of territorial jurisdiction - into a principle of extraterritorial jurisdiction.²⁴ The

¹⁸ Chapter three.

¹⁹ Third Restatement, *supra* n 16, para.402, Comment (f); also *ibid.*, para.403(3).

²⁰ *Ibid.*

²¹ Doyle, C., (2012). ‘Extraterritorial Application of American Criminal Law, Congressional Research Service, at p.12.

²² See also *Yousef*, 327 F.3d56 (2nd Cir., 2003), at pp.68-69.

²³ Third Restatement, *supra* n 16, para.402(1) (*italic added*).

²⁴ Cameron, I. (1994). ‘The Protective Principle of International Criminal Jurisdiction’. Aldershot: Dartmouth, at p.62; Hixson, K. (1988). ‘Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States’. 12 *FordhamInt’lL.J.* 127.

Restatement also gave a prominent position to the effects principle and asserted that protective jurisdiction is a ‘special application’ of the effects principle, which has ‘been treated as an independent basis of jurisdiction’, thus subsuming the former under the latter.²⁵ Notably, the Restatement provided no evidence to support this assertion. This was pointed out by Jennings in his analysis of the ALI’s drafting of the Restatement (Second) in 1965, which first elaborated the ‘effects’ principle.²⁶ Jennings argued that there is no authority in international law that has been cited by the Restatement to support the validity of the effects principle, which covers ‘the whole ground of the so-called protective principle to which many States attach importance’.²⁷ According to Jennings, the drafters of the Restatement (Second) had argued in support of the effects principle:

the inadvisability of extending the protective principle to cover the anti-trust cases, on the ground that the protective principle might then equally be extended in other instances, possibly objectionable to United States’ interests, in which a state might like to enforce, whenever it could catch a defendant ...

Jennings, in reply to this argument, rightly pointed out that the ‘Reporters fail to notice that these objections must inescapably apply equally to a territorial principle so inflated to cover these cases.’²⁸ Given that the effects principle is supposed to be based on the principle of objective territoriality and therefore is an ‘aspect of jurisdiction based on territoriality’, as was pointed out by the commentary of the Restatement,²⁹ then the reasoning of the ALI, if taken to its logical conclusion, would mean that the protective principle is also an aspect of territoriality. Importantly, the Restatement has had a profound influence on the view of U.S. courts, legal scholarship and even the ILC, all of which have interpreted protective jurisdiction in narrow terms, confused the protective and effects principles and mistakenly assumed that protective jurisdiction is restricted to offences ‘directed’ at or intended to have an ‘effect’ within the prescribing State’s territory.³⁰

²⁵ Third Restatement, *supra* n 16, para.402, Comment (f).

²⁶ ALI, Restatement (Second) of Foreign Relations Law of the U.S. Washington, D.C. (1965), para.34. See also Mann, F.A. (1964). ‘The Doctrine of Jurisdiction in International Law’. 111 *Recueil des Cours* 1, at p.42.

²⁷ Jennings, R.Y. (1962). ‘The Limits of State Jurisdiction’. 32 *NoTIR* 209, at p.222.

²⁸ *Ibid.*, at p.223.

²⁹ Third Restatement, *supra* n 16, para.402, Comment (d); also *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, Judgment, I.C.J. Reports 2002, p.3, at p.73 (J. Sep. Op. Judges Higgins *et al.*).

³⁰ E.g., *U.S. v Cadena*, 585 F.2d1252 (5th Cir., 1978), at p.1258; *U.S. v Keller*, 451 F.Supp.631 (DPR, 1978), at p.635; *U.S. v May May*, 470 F.Supp.384 (S.D. Texas, 1979); *U.S. v Arra*, 630 F.2d.836 (1st Cir., 1980); *U.S. v Baker*, 609 F.2d134 (5th Cir., 1980), at p.139; *U.S. v Egan*, 501 F.Supp.1252 (S.D.N.Y.,

A more recent study of protective jurisdiction in State practice was undertaken in 2009 by the ‘Task Force on Extraterritorial Jurisdiction’, under the auspices of the International Bar Association (IBA).³¹ The State practice surveyed by the Task Force comprised the legislative and judicial practice of 27 States, although the Task Force did not explain the methodology used and the reason for focusing on the States selected. The Task Force found that 22 of the 27 States have enacted legislation based on the protective principle. According to the Task Force, over half of these States permit protective jurisdiction over any crime deemed to have been committed ‘against a state’s general, fundamental or economic interests’, while over one third of them permit protective jurisdiction ‘where the crime involves the state’s government, public authorities, military or agents abroad.’ The other crimes covered by national legislation under the protective principle, according to the Task Force, include ‘crimes involving national security, acts of war and arms offences’; ‘counterfeiting the state’s currency or seal and treason and/or interference with a state’s democratic rule, constitution or independence’; ‘arms control laws’; and ‘perjury before consuls’. This survey of State practice provides important insight into some of the offences which have been included under the ambit of protective jurisdiction, although it is far from being comprehensive. As for the remaining five States of the sample examined by the Task Force, the States which have not made use of protective jurisdiction in their national laws, according to the Task Force, are India, New Zealand and the U.K., while its use by South Africa and Tajikistan, suggested the Task Force, was unknown. As will be shown below, however, all of these States have, in fact, and to varying degrees, used protective jurisdiction, particularly in response to the threat of international terrorism.

The present chapter aims to contribute to these existing studies by providing empirical research into State practice. Before presenting the findings of the number of States that have made provision for protective jurisdiction and the type of offences that have been

1980); *U.S. v Mann*, 615 F.2d668 (5th Cir., 1980), at p.671; *U.S. v Ricardo*, 619 F.2d1124 (5th Cir., 1980), *cert. denied*, 449 U.S. 1063, 101 S.Ct. 789, 66 L.Ed.2d 607; *U.S. v Newball*, 524 F.Supp.715 (E.D.N.Y., 1981), at p.720; *U.S. v Wright-Barker*, 784 F.2d161 (3rd Cir., 1986), at pp.168-169; *U.S. v Peterson*, 812 F.2d486 (9th Cir., 1987); *U.S. v Perlaza*, 439 F.3d1149 (9th Cir., 2006), at p.1162; U.N. Doc.A/CN.4/596 (2008), at p.13; Kontorovich, E. (2004). ‘Universal Jurisdiction and the Piracy Analogy’. 45 *HarvardInt’lL.J.* 183, at pp.189-190; Ryngaert, C. (2008). ‘Jurisdiction in International Law’. Oxford: OUP, at p.96.

³¹ IBA, Legal Practice Division, ‘Report of the Task Force on Extraterritorial Jurisdiction’ (28 September 2008), at pp.149-150.

included under its ambit, it is useful first to explain the methodology used for the collection of data and its principal limitations.

4.3. Research Methodology

The State practice examined by the present chapter is in the form of national legislation adopted by States which makes provision for jurisdiction under the protective principle and is used in response to international terrorism. The focus on national laws, as has already been explained in chapter one, is consistent with a legal positivist approach to international law-making, which aims to identify the law ‘as it is’ and the evolution of customary international law by placing weight on State practice. In addition to national laws, there is a relatively small, albeit important, corpus of domestic court decisions evidencing the use of protective jurisdiction for combating international terrorism, both in a criminal law context and for violations of the laws of war.³²

It has traditionally proven methodologically difficult to access national laws and those relating to ‘terrorism’ have been no exception, especially in a community of nearly 200 States. The present work has sought to overcome this hurdle by utilising a number of primary sources. The first of these is the U.N. Legislative Series, entitled ‘National Laws and Regulations on the Prevention and Suppression of International Terrorism’.³³ The Legislative Series is a compendium of national laws and reports submitted by States to the U.N. Secretary-General ‘relating to the prevention and suppression of terrorism in all its forms and manifestations.’³⁴ The submissions made by States *inter*

³² E.g., *Bin Laden*, *supra* n 16; *U.S. v Ghailani*, S10 98 Crim.1023 (LAK) (S.D.N.Y., 12 July 2010)(Indictment); *U.S. v Ghailani*, 761 F.Supp.2d167 (S.D.N.Y., 21 January 2011); *U.S. v Babar Ahmad*, (D.Conn., 2004)(Indictment); *U.S. v Mustafa Kamel Mustafa et al.*, S2 04 Cr.356 (JFK) (S.D.N.Y., 2006)(Indictment); *U.S. v Khalid Sheikh Mohammed et al.* (S14) 93 Cr.(KTD) (S.D.N.Y., 14 December 2009)(Indictment); *U.S. v Ahmed Abu Khatallah*, 14-cr-00141 (D.D.C., 26 June 2014)(Indictment); Military Order No.1 on the ‘Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism’, issued by the U.S. President on 13 November 2001; U.S. Office of Military Commissions, MC Form 458, Charge Sheet (18 June 2008) [*Ghailani*]; U.S. Office of Military Commissions, MC Form 458, Charge Sheet (31 May 2011) [*KSM5*]; U.S. Office of Military Commissions, MC Form 458, Charge Sheet (15 September 2011) [*Al-Nassir*]; U.S. Office of Military Commissions, MC Form 458, Charge Sheet (28 May 2008) [*Binyam Ahmed Mohamed*]. See further National Security Division of the Justice Department, ‘Introduction to National Security Division Statistics on unsealed International Terrorism and Terrorism-Related Convictions, available online: www.fas.org/irp/agency/doj/doj032610-stats.pdf; New York University, Center on Law and Security, ‘Terrorist Trial Report Card: September 11, 2001-September 11, 2010’, 2010.

³³ U.N. Legislative Series, ‘National Laws and Regulations on the Prevention and Suppression of International Terrorism’. Part I. New York: U.N. (2002); U.N. Legislative Series, ‘National Laws and Regulations on the Prevention and Suppression of International Terrorism’. Part II. New York: U.N. (2005).

³⁴ Legislative Series (2002), *ibid.*, at p.vi.

alia consist of specific legislation implementing international and regional counter-terrorism conventions, as well as other national laws which are regarded as being relevant to the topic, and are prepared by the U.N. Codification Division of the Office of Legal Affairs, pursuant to paragraph 10(b) of the ‘Declaration on Measures to Eliminate International Terrorism’, which is annexed to U.N. General Assembly resolution 49/60 of 9 December 1994.³⁵ The purpose of compiling these national laws and reports is to ‘provide resource material and thereby contribute to enhancing international cooperation in the struggle against terrorism.’³⁶ The Legislative Series, as has been pointed out by the ILC, is also one of the ways of evidencing customary international law.³⁷

The Legislative Series, according to the Secretary-General, should be read in conjunction with the annual reports produced by the Secretary-General on ‘Measures to eliminate international terrorism’, prepared pursuant to General Assembly resolution 50/53 of 11 December 1995, which provide a summary of the measures taken by States to address international terrorism;³⁸ and the mandatory national reports submitted periodically by States to the CTC, pursuant to paragraph 6 of resolution 1373, which detail the measures taken by States to implement resolution 1373 in their national laws.³⁹ The national reports submitted to the CTC detail existing national laws enacted prior to the adoption of resolution 1373, as well as legislative reform being carried out and that which is being planned, in order to implement resolution 1373. These reports provide a fairly comprehensive snapshot of national laws and practice regarded by States as being relevant to combatting the threat of international terrorism; they also exhibit official statements and attitudes and are indicative of *opinio juris*. The present chapter accordingly utilises both of these additional resources.

The chapter also utilises the U.N. ‘Terrorism Legislation Database’, which is a compilation of national legal resources for combating acts of terrorism and is prepared

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ ILCYB, 1950, vol.II, paras.24-94.

³⁸ Legislative Series (2005), *supra* n 33, at p.vii. Annual reports are available online: www.un.org/terrorism/sg-reports.shtml.

³⁹ S/RES/1373, *supra* n 4, para.6. National reports are available online: www.un.org/en/sc/ctc/resources/countryreports.html.

by the U.N. Office on Drugs and Crime (UNODC).⁴⁰ The chapter draws upon the mandatory national reports submitted by States to a Committee established by the Security Council, pursuant to resolution 1540, concerning the implementation in national laws of provisions concerning the prevention and punishment of the proliferation of nuclear, chemical and biological weapons by non-State actors, in particular for terrorist purposes;⁴¹ and the non-mandatory reports submitted by States to the CTC, pursuant to resolution 1624, concerning the implementation in national laws of provisions concerning the prohibition and prevention of incitement of terrorist acts.⁴² The CTC has recently issued a number of reports relating the national implementation of resolutions 1373 and 1624.⁴³ Lastly, it draws upon the reports of the European Commission on the measures taken by Member States of the Council of Europe to implement the 2002 Framework Decision on Terrorism, which provides for jurisdiction under protective principle.⁴⁴ In that connection, the chapter also utilises ‘Country profiles on counter-terrorism capacity’, compiled by an inter-governmental committee of experts under the auspices of the Council of Europe.⁴⁵

It is important at this stage to make a few preliminary remarks regarding the principal limitations of the present chapter. The first of these is the selection of data, which is limited to the specific national laws that are perceived by States as relevant for combatting international terrorism and submitted or reported to the relevant U.N. bodies, rather than a comprehensive overview of national laws more generally. That

⁴⁰ U.N. International Legal Resources, Terrorism Legislation Database, National Legal Resources on Terrorism, available online: www.undoc.org/tldb/browse_countries.html.

⁴¹ S/RES/1540 (28 April 2004). The legislative database is available online: www.un.org/sc/1540/legisdatabase.shtml.

⁴² S/RES/1624 (14 September 2005). The legislative database is available online: www.un.org/en/sc/ctc/resources/1624.html.

⁴³ See ‘Survey of the implementation of Security Council resolution 1373 (2001). Report of the Counter-Terrorism Committee’, U.N. Doc.S/2008/379 (CTC Report (2008)); ‘Survey of the implementation of Security Council resolution 1373 (2001) by Member States’, U.N. Doc.S/2009/620 (CTC Report (2009)); ‘Report of the Counter-Terrorism Committee to the Security Council on the implementation of resolution 1624 (2005)’, U.N. Doc.S/2006/737; ‘Second report of the Counter-Terrorism Committee to the Security Council on the implementation of resolution 1624 (2005)’, U.N. Doc.S/2008/29.

⁴⁴ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, O.J. L 164 of 22 June 2002, p.3; Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, COM(2004)409 final of 08.06.2004, at p.7; Commission Staff Working Paper, Annex to the Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism. COM(2004)409 final of 08.06.2004, COM(2007) 0681 final; Report of the Secretary-General of the European Commission, Commission Staff Working Paper, Annex to Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, SEC(2007)1.

⁴⁵ ‘The Committee of Experts on Terrorism (CODEXTER)’, available online: www.coe.int/t/dlapil/codexter/overview_en.asp.

said, all of the primary sources identified above comprise a range of ordinary criminal offences that are not limited to ‘terrorism’, a point which will be returned to below. The quality and accuracy of the data are dependent, firstly, upon the sufficiency and detail of the national laws and reports submitted by States and, secondly, the translation, presentation and publication of them by the relevant U.N. bodies. These national laws, it should be noted, are generally limited to time of peace and therefore do not include violations of the laws and customs of war committed during armed conflict. A number of national laws have had to be translated by the author. Temporally, the Legislative Series is limited to the period since 2005. Given the on-going process of legislative reform in responding to international terrorism, many of the laws included in this collection may therefore either be incomplete, not fully implemented and/or out of date.

As regards the national reports submitted by States to the CTC relating to the implementation of resolution 1373, the vast majority of States, in accordance with its mandatory requirements, have submitted an initial report, and subsequently between two and four follow-up reports in the years 2002 to 2006. These reports vary in number as well as quality. The national reports submitted to the CTC relating to the implementation of resolution 1624 are much fewer in number, as this resolution is not mandatory; moreover, only one set of these reports is available, namely between 2005 and 2006. Temporally, the national reports relating to resolutions 1373 and 1624 are available only until 2006, following a decision by the Security Council to no longer make them publicly available.⁴⁶ The present chapter has collected some national laws up to the period of 2009, by using the annual reports produced by the U.N. Secretary-General on ‘Measures to eliminate international terrorism’ and the ‘Terrorism Legislation Database’, as well as the ‘Country profiles on counter-terrorism capacity’, although this is by no means comprehensive.⁴⁷

A further important limitation is that national laws are not always drafted in clear terms; vaguely defined laws may cover a potentially broad range of conduct. Nor, it has to be stressed, is the extraterritorial scope and application of national laws always clearly defined, and rarely are grounds of jurisdiction spelled out, either in the laws themselves

⁴⁶ The author has contacted the U.N. to obtain national reports dated between 2006 and 2011 but access to these documents was denied.

⁴⁷ See also Saudi Arabia, Penal Law for Terrorism Crimes and Financing of Terrorism, Official Gazette, *Um Al-Qura*, 31 January 2014.

or in the national reports submitted by States to the CTC or other relevant U.N. bodies. Grounds of jurisdiction may also be confused and/or inaccurately described by some States. A broader issue raised, which goes to the heart of the drafting, adoption and interpretation of legislation at the domestic level, is the conspicuous absence of an instrument codifying extraterritorial jurisdiction, or otherwise any authoritative guidance at the international level, for example, from U.N. organs such as the Security Council or the ILC or the ICJ. Notwithstanding the few existing private studies, discussed above, States have no informed point of reference, as a matter of international law, of grounds of jurisdiction, or their scope and application.⁴⁸ Given the absence of any agreed definition of grounds of jurisdiction in international law, it should be of little surprise that States do not, as a general rule, expressly specify the theory relating to the ground of jurisdiction upon which their domestic laws apply to the conduct of foreign nationals abroad, or, for that matter, define the vital interests which they are seeking to protect. It is, perhaps, for the same reason that the numerous resolutions adopted by the General Assembly and Security Council in response to international terrorism do not make reference to grounds of jurisdiction. It should thus be borne in mind that national laws and their extraterritorial application based on protective jurisdiction are, in the majority of cases, based on the author's subjective interpretation. Given the limitations outlined above, the present chapter does not claim to be comprehensive.

There are two final remarks regarding the interpretation of national laws, the first of which relates to the theory of passive personality jurisdiction and the second concerns the extradite or prosecute principle. Turning to the first issue, it will be recalled in chapter one that the theory of passive personality has, it is submitted, been confused with protective jurisdiction. The national laws relating to serious offences and acts of terrorism committed against the State's nationals are interpreted by the present work as based on the protective principle.⁴⁹ As regards the second issue, a number of national laws analysed by the present chapter apply to the conduct of foreign nationals abroad, irrespective of any apparent prescriptive connection with the accused or the alleged offence, other than the presence of the accused in the legislating State's territory. The reason for this is that these laws implement the obligation to extradite or prosecute contained in counter-terrorism treaties and, more recently, Security Council resolution

⁴⁸ See further chapter six.

⁴⁹ See chapter five.

1373. The prescriptive jurisdiction arising out of the extradite or prosecute principle, as will be explained in greater depth in chapter five, has been interpreted in the present chapter as a form of ‘treaty-based jurisdiction’ that is used as a mutually beneficial means by which States are able to protect certain of their vital interests.⁵⁰ The national laws making provision for extraterritorial jurisdiction under the extradite or prosecute principle are therefore interpreted in the present chapter as evidence of State practice in support of the protective principle of prescriptive jurisdiction and not as universal prescriptive jurisdiction.

4.4. Protective Jurisdiction in National Laws

On the basis of a detailed empirical analysis of the available data, the national laws of 160 States, out of a total of 181 of the available sample, have made provision, to varying degrees, for an exception to the territoriality of jurisdiction under the protective principle.⁵¹ Only a small number of States, 21 in total, some of which regard acts of terrorism as posing a threat to their security and certain other of their vital interests, have not made provision in their national law for extraterritorial jurisdiction over the conduct of foreign nationals abroad.⁵² Of course, this does not mean that these States regard the protective principle as contrary to international law.

The section that follows aims to present a summary of the key findings on the number of States and the type of offences covered by national legislation under the protective principle. It is useful at this stage to say a few words as to the methodology used for the presentation of data. The protective principle has been used by different States to varying degrees and over a broad range of offences. It is not the aim of the present chapter to undertake a comparative analysis of each of the provisions or elements of the many different offences contained in national laws, including the different and diverging definitions of ‘terrorism’, which would be difficult, if not impossible, to harmonise. Empirical analysis of the divergent ways in which national laws deal with and define ‘terrorism’ has already been undertaken elsewhere by Saul.⁵³ Rather, the aim

⁵⁰ See also chapter one.

⁵¹ Appendix A.

⁵² *Ibid.*

⁵³ See Saul (2006), *supra* n 13, at pp.262-270; Saul, B. (2011). ‘Legislating from a Radical Hague: The UN Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism’. 24 *LJIL* 677, at p.683.

here, having undertaken a detailed analysis of the objective and subjective elements of offences, is to provide a more general overview and identify, as a preliminary matter, some of the more common themes and general trends in national laws relating to jurisdiction, with a view to the potential codification of protective jurisdiction. This approach is not unusual and it is one that is used by the ILC for the codification of international law. Accordingly, with that aim in mind, and for the purpose of presentation and further analysis, an effort has been made, where possible, to systematise the offences contained in national laws into categories where they appear to be of a similar subject-matter. The same approach has been used by the IBA in its analysis of protective jurisdiction in State practice.⁵⁴ The reason for categorising offences in this way in the present chapter, however, is in order to try and deduce from national laws vital interest typologies; that is, some of the vital interests that States have included under the ambit of protective jurisdiction *lex lata* and around which a basic level of agreement appears to have clustered.⁵⁵ It may then, in turn, be possible to define and codify protective jurisdiction based not on a uniform list of specified offences but, rather, based on the enumeration of certain vital State interests, a core category of which is shared by the international community.⁵⁶ A similar approach to the codification of jurisdiction appears to have been used by the Harvard Research and the ALI, discussed above. Given that there is no internationally agreed definition of ‘terrorism’, and the fact that national laws are not harmonised, it has to be borne in mind that the offences listed within a particular category may not be of the same, or even similar, definition; also, some of the categories may overlap.

Due to the scope of the present chapter, these categories of offences are listed in full in Appendix A. The focus here is on those categories for which there is broad support in national laws. The categories of offences listed in Appendix A consist of legislation implementing international and regional counter-terrorism conventions and Security Council resolutions 1373 and 1640, as well as other national laws dealing with more general crimes which are regarded by States as being relevant, either directly or indirectly, to the topic of combatting international terrorism, as this term is defined or otherwise understood by each State. It may therefore be the case that some of the

⁵⁴ *Supra* n 31.

⁵⁵ Chapters five.

⁵⁶ Chapters five & six.

offences contained in these national laws appear, at first glance, to have little or no relevance to or association with ‘terrorism’; for instance, forgery or counterfeit of the State’s official seals or currency; economic or commercial espionage; insult or destruction of the State’s flags or symbols; and insults against the President and the nation. The inclusion of these national laws in primary sources may have been incidental or due to the fact that the national laws of the majority of States traditionally have not defined ‘terrorism’ or provided for special ‘terrorism’ offences. Rather, they have dealt with terrorist acts under their Criminal Codes as ordinary criminal offences, such as laws dealing with armed bands, subversive associations, military and paramilitary groups and criminal organisations. These offences do not require proof of a specific ‘terrorist’ intent or outcome, such as a purpose to intimidate or terrorise a population or to coerce a government, and are applicable irrespective of any political, ideological, or religious motive.⁵⁷ The national laws of over half of all States, as has already been explained elsewhere by Saul, prosecute terrorist acts as ordinary criminal offences.⁵⁸ A similar approach has long been used in international counter-terrorist conventions and Security Council resolutions, due to the absence of an internationally agreed definition of ‘terrorism’.⁵⁹ On the other hand, almost half of all States have now enacted special terrorism offences, which is the approach taken in common law jurisdictions, such as Britain, Australia, Canada, South Africa, New Zealand and the U.S., and has been used increasingly by other countries since the adoption by the Security Council of resolution 1373.⁶⁰ However, almost all of these special ‘terrorism’ offences, as rightly suggested by Saul, include widely divergent definitions of ‘terrorism’.⁶¹ The upshot of all this is that the categories of offences listed in Appendix A contain a broad range of offences, some of which relate to a special crime of ‘terrorism’, with others being based on ordinary criminal offences that are not limited to acts of terrorism.

⁵⁷ E.g., Saul (2012), *supra* n 13, at p.134; Paust, J.J., “‘Nonprotected’ Persons or Things”, in Murphy, F.J. & Evans, E.A. (eds.) (1978). ‘Legal Aspects of International Terrorism’. D.C. Heath & Co.: Massachusetts, at p.348.

⁵⁷ See Saul (2006), *supra* n 13, at pp.262-270; Samuel *et al.*, *supra* n 3, at pp.36-37.

⁵⁸ Saul, *ibid.*, at pp.264-265.

⁵⁹ Cf. more recent conventions do require a specific terrorist intention, e.g., International Convention on the Suppression of the Financing of Terrorism, New York, 9 December 1999, 2178 UNTS 197, Article 2b (Terrorist Financing Convention); International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005, 2445 UNTS 89, Article 2.

⁶⁰ Saul (2006), *supra* n 13, at p.50.

⁶¹ *Ibid.*; also CTC Report (2008), *supra* n 43, at p.34; CTC Report (2009), *supra* n 43, at p.48.

It is apparent that some of the categories of offences listed in Appendix A are supported by the laws of very few States, and are regarded by some commentators as overbroad or even an abuse of jurisdiction.⁶² On the other hand, 17 of them have broader support in national laws, which are listed here in descending order:

- (i) Crimes committed against the State by terrorist groups, armed bands, subversive associations, military and paramilitary groups and criminal organisations (as defined by national laws) which transcend national boundaries. This includes the membership, organisation, participation, facilitation, instruction, direction, support, recruitment and leadership of such groups and their activities (86 States);
- (ii) Crimes committed against the State's sovereignty, territorial integrity, political independence or constitution (76 States);
- (iii) Crimes and acts of terrorism (as defined by national laws) committed against the State's nationals, inside or outside national territory (75 States);
- (iv) Crimes committed against the State's 'internal' or 'external' security (70 States);
- (v) Crimes committed against or on board the State's registered civil aircraft (66 States);
- (vi) Financing and support of terrorist and armed groups (63 States);
- (vii) Counterfeit of currency, seals and official documents (61 States);
- (viii) Hostage-taking (54 States);
- (ix) Illicit manufacture, traffic or supply of military weapons and explosives; unmarked plastic explosives; nuclear and radioactive materials; dangerous waste; chemical and biological weapons; contagious disease pathogens; and weapons of mass destruction, to be used or threatened to be used against the State's interests (54 States);
- (x) Crimes committed against or on board the State's registered vessels (53 States);
- (xi) Crimes committed against diplomatic and consular personnel carrying out official duties abroad, as well as embassies and other diplomatic and consular premises and transportation located abroad (52 States);
- (xii) Damage or destruction, including by the use of explosives and bombs, of government buildings, property, premises, infrastructure facilities, installations and aircraft; public transportation systems; and information systems, located inside and outside national territory (50 States);
- (xiii) Crimes committed against Heads of State and government officials (39 States);
- (xiv) Acts of terrorism (as defined by national laws) and crimes committed against international organisations (32 States);
- (xv) Unlawful obtaining, use, threat to use, or conspiracy to use nuclear materials (25 States);
- (xvi) Crimes committed against the State's fundamental social, political, constitutional or economic order (23 States); and
- (xvii) Crimes committed against registered fixed platforms and off-shore installations (21 States).

⁶² E.g., Greenwood, C., 'State Jurisdiction', U.N. Audiovisual Library of International Law, Lecture Series (2008).

These categories are indicative of the main trends on the use of protective jurisdiction in national laws, at least within the context of international terrorism. The empirical analysis of national laws gives rise, however, to two broader, discernible trends. First of all, it is reasonable to suppose that, notwithstanding different and divergent definitions of substantive crimes, protective jurisdiction is deeply embedded in the legislation of a large number of diverse countries and that such practice may be sufficiently uniform and widespread so as to support the finding that protective jurisdiction is a rule of customary international law.⁶³ The considerable variation in the definition of substantive crimes does not necessarily preclude the identification of a customary rule where there is an ‘underlying thread or theme’.⁶⁴ It is perhaps notable that protective jurisdiction has been used by the national laws of all the permanent members of the Security Council, which is all important for the formation of custom. That said, while this practice may appear to evince a general *opinio juris* among States, the ‘belief’ of States with regard to the existence and content of this rule is less clear. The reason for this is due to the confusion and lack of certainty surrounding theories relating to grounds of jurisdiction and the nomenclature used to describe them. This consideration is illustrated, for example, by the prescriptive jurisdiction arising out of the obligation to extradite or prosecute, which has been described by a number of States and in legal scholarship as ‘universal jurisdiction’.⁶⁵ Nonetheless, this finding of State practice is potentially of great importance. This is so because protective jurisdiction is little understood by States, courts and in legal scholarship and has either been defined in overly-narrow terms or else its validity in international law has been questioned.⁶⁶

The second of these trends is that States, it would appear, attach great importance to extraterritorial jurisdiction for the protection of certain of their vital interests and is the principal means by which States combat the threat of international terrorism.⁶⁷ In that regard, the present chapter has found no evidence of the use of other grounds of extraterritorial jurisdiction, other than crimes committed by the State’s nationals and

⁶³ E.g., see U.N. Doc.A/CN.4/659 (2013), paras.16-20.

⁶⁴ *Ibid.*, at p.12.

⁶⁵ *Supra* n 16 & chapter five.

⁶⁶ See chapter one.

⁶⁷ See chapter five.

residents by virtue of the nationality principle.⁶⁸ There also appears to be an ascending trend as to the use of protective jurisdiction for combatting the threat of international terrorism. This trend has recently been alluded to in a study by the ILC Secretariat, which found that protective jurisdiction may be of particular relevance for combatting international terrorism.⁶⁹ It is important to note that this trend is not new and appears to be one that has been developing over the past few decades.

4.4.1. Protective Jurisdiction for Combatting International Terrorism: An Ascending Trend?

In order to illustrate the trend described above, it is perhaps useful to consider one of the earliest, modern examples of the use of protective jurisdiction for combatting international terrorism, in particular, Arab terrorist activities. In 1972, Israel amended its domestic law (Offences Committed Abroad), which by virtue of section 2(a) provided, in pertinent part, that:

[t]he courts in Israel are competent to try under Israeli law a person who has committed an act which would be an offence if it had been committed in Israel and which harmed or was intended to harm the State of Israel, its security, property or economy or its transport or communications link with other countries.⁷⁰

This legislation provided for rather broad extraterritorial jurisdiction, on the basis of which an Israeli military court in 1973 convicted Faik Bulut, a Turkish citizen, who had been seized from a Palestinian refugee camp 100 miles into Lebanon and taken to Israel by Israeli forces, for membership of Al-Fatah in Lebanon and Syria. The court *inter alia* cited the protective principle in upholding the validity of the extraterritorial application of the Israeli statute. The statute, by virtue of section 4(a), also provided Israeli courts with protective jurisdiction over terrorist acts committed against or intended to harm the life, health, freedom or property of an Israeli national or resident abroad, with the only qualification being that the act also be recognised as an offence in the place where it is committed. The Israeli statute was criticised in legal scholarship at the time as a

⁶⁸ Cf. 'Observations by Belgium on the scope and application of the principle of universal jurisdiction', *supra* n 14; 'The scope and application of the principle of universal jurisdiction: information provided by Spain', *supra* n 14.

⁶⁹ *Supra* n 8, at pp.523-525.

⁷⁰ See Murphy, J.F. 'Protected Persons and Diplomatic Facilities', in Murphy & Evans, *supra* n 57, at pp.284-285; Murphy, J.F. (1985). 'Punishing International Terrorists'. USA: Rowan and Allanheld, at p.31; Note (1973-1974). 'Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law'. 72 *Mich.L.Rev.* 1087.

‘deviation to the general pattern in national legislation of territorial jurisdiction’,⁷¹ as well as ‘very broad’,⁷² ‘exorbitant’,⁷³ and even an ‘abuse’⁷⁴ of jurisdiction under international law. However, the broad jurisdiction used by Israel in the 1970s is now reflected in the current practice of many States.

Another notable example of this trend is the inclusion of protective jurisdiction in the 1973 Internationally Protected Persons Convention, which was negotiated in response to the rise of international terrorist attacks in various parts of the world against diplomatic personnel and premises.⁷⁵ The convention *inter alia* had as its aim the enhancement of the protection of persons entitled to special protection under international law from terrorist attacks. This was achieved, by virtue of Article 3(1)(c), by establishing the extraterritorial jurisdiction of the sending State over attacks against its own internationally protected persons; it thus departed from the existing domestic laws of the majority of States, which left the prevention and punishment of such attacks solely to the territorial jurisdiction of the receiving State where the crime was attempted or had been committed.⁷⁶ An examination of national laws by Murphy in 1978 in relation to the protection of diplomats, in particular terrorist attacks, found that the national laws of most States provided for severe criminal penalties over attacks against diplomats but their jurisdictional scope was limited to crimes within the territory of the prosecuting State. Murphy was of the view that some national laws might be interpreted so that attacks on a State’s diplomats abroad are covered under the protective principle, although ‘there seems to be no apposite case’.⁷⁷ However, Murphy went on to doubt the applicability of protective jurisdiction, which he suggested ‘has generally been narrowly interpreted so as to apply only to a few offences in time of war directly affecting state security or to offences involving government administrative functions’.⁷⁸ That said, and contrary to the analysis by Murphy, the 1975 French Code of Criminal Procedure,

⁷¹ Murphy (1978), *ibid.*, at p.285.

⁷² Meron, T. (1978). ‘Non-Extradition of Israeli Nationals and Extraterritorial Jurisdiction: Reflections on Bill No. 1306’. 13 *Isr.L.Rev.* 215, at p.219.

⁷³ Note, *supra* n 70, at p.1088.

⁷⁴ Gaynes, J.B. (1978). ‘Bringing the Terrorist to Justice: A Domestic Law Approach’. 11 *CornellInt’lL.J.* 71, at p.76.

⁷⁵ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973, 1035 UNTS 167.

⁷⁶ Rozakis, C.L. (1974). ‘Terrorism and the Internationally Protected Persons in the Light of the ILC’s Draft Articles’. 23 *ICLQ* 32, at p.52.

⁷⁷ Murphy, *supra* n 70, at p.284.

⁷⁸ *Ibid.*

Article 694, appears to have been one of the earliest examples of the use of protective jurisdiction over attacks against diplomatic and consular premises and agents and was adopted in response to a terrorist attack in the previous year on a French embassy in The Hague.⁷⁹ In any case, the national laws examined by Murphy may be contrasted with the more recent State practice compiled by the present chapter, which has found that 52 States permit jurisdiction over crimes committed against their diplomatic and consular personnel carrying out official duties abroad, as well as embassies and other diplomatic and consular premises and transportation located abroad. The protective principle, as will be explained in the next chapter, has in recent years been relied upon by the U.S. to ground numerous national prosecutions of acts of terrorism and offences that are deemed to be associated or have a link with such acts abroad (including inchoate offences), in particular attacks against its diplomatic personnel and premises, which has not been protested and, indeed, has received support by other States in the form of extradition of alleged offenders to the U.S and by the Security Council.⁸⁰ There are also States, such as the U.K. and South Africa, which have traditionally refrained from providing for extraterritorial jurisdiction in their national laws but have nevertheless done so in recent years in order to protect their diplomatic persons and property and certain other of their vital interests from acts of terrorism.⁸¹

The trend in State practice as to the use of protective jurisdiction for combatting international terrorism may have been facilitated, and even encouraged, by the discernible trend in the practice of the General Assembly to use this principle in counter-terrorism treaties, as well as its use in regional instruments.⁸² The trend may have also been intensified more recently by the increasing, albeit selective, role of the Security Council in taking measures against international terrorism, in particular the

⁷⁹ Blakesley, C.L. (1984). 'A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes'. 1984 *UtahL.R.* 685. Blakesley, C.L., 'Extraterritorial Jurisdiction', in Bassiouni, C.M. (ed.) (1999). 'International Criminal Law'. Ardsley: Transnational, at pp.60-61; Gaynes, *supra* n 74, at p.77.

⁸⁰ On the importance to the absence of opposition to a rule in the practice of States, see *supra* n 63, at p.20.

⁸¹ As regards South Africa, see the 'Prevention of Organised Crime Act 1998'; 'Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004'; and 'Prohibition or Restriction of Certain Conventional Weapons Act 2008'; 'South Africa's reply to the letter dated 15 April 2002 received from the Chairperson of the Security Council's Counter-Terrorism Committee, Ambassador J. Greenstock, containing comments on South Africa's national report (S/2001/1281) submitted pursuant to paragraph 6 of Security Council resolution 1373 (2001)', U.N. Doc.S/2002/792, at p.20; U.K., Terrorism Act 2000, Ch.11, section 63; Anti-terrorism, Crime and Security Act 2001, Ch.24, sections 109, 113, as amended by the Crime (International Co-operation) Act 2003, Ch.32, section 53; Terrorism Act 2006, Ch.11, sections 1 and 17.

⁸² See chapter five.

‘rush to law’ by the Council in its adoption of resolution 1373.⁸³ Indeed, protective jurisdiction has been at the heart of the unprecedented legislative response by States in the implementation of resolution 1373.⁸⁴ In order to further illustrate the influence of resolution 1373, it is perhaps useful to consider, by way of example, the domestic law of Germany, which has undergone major changes to provide for broad jurisdiction under the protective principle in order more effectively to combat international terrorism.⁸⁵

The German Criminal Code has traditionally dealt with acts of terrorism as ordinary crimes and criminalised the formation of, and certain offences committed by, ‘criminal’ and ‘terrorist’ organisations where these were committed on German territory.⁸⁶ However, in August 2002, the Criminal Code was amended to include Article 129b, by virtue of which the formation, membership, support and recruiting of members or supporters of ‘criminal’ or ‘terrorist’ organisations abroad are criminalised.⁸⁷ Article 129b is applicable outside Member States of the European Union (EU), where an offence is ‘committed by way of an activity exercised within the Federal Republic of Germany or if the offender or victim is a German or is found within Germany’. The prescriptive jurisdiction of Germany may be interpreted as based on the protective principle where the victim is of German nationality or where the accused is ‘found’ on German territory. This latter ground of jurisdiction is the implementation of the extradite or prosecute principle and, as will be explained in chapter five, is broad enough to encompass offences committed abroad but means that Germany does not have to evidence any prescriptive connection with an alleged offence, for example, threats to its vital interests, other than the accused’s presence. It is worth noting that the EU had already issued, in 1998, a Joint Action, requiring Member States to criminalise the participation in a ‘criminal organisation’, which is broad enough to encompass

⁸³ S/RES/1373, *supra* n 4.

⁸⁴ E.g., Britain, Canada, China, Cambodia, Cape Verde, Germany, Israel, Italy, Poland, South Africa, Russia, San Marino, the Netherlands, Saudi Arabia, Turkmenistan and U.S.

⁸⁵ See also U.N. Doc.A/65/175 (2010), at pp.7-8; UNODC, ‘Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments’, U.N.: New York (2006), para.390; UNODC, ‘Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols’. U.N.: New York (2003), para.69; Germany, available online: www.coe.int/t/dlapil/codexter/Country%20Profiles/CODEXTER%20Profile%20_2011_%20Germany_EN.pdf.

⁸⁶ Criminal Code, sections 129-129a.

⁸⁷ The amendment of the Criminal Code, 22 August 2002, Federal Law Gazette, 2002 I, p.3390, passed into law 1 September 2002.

terrorist organisations, in the territory of EU Member States.⁸⁸ In the light of the events of 9-11 and the adoption of resolution 1373, however, Germany considered it necessary to expand its jurisdiction over offences committed outside the borders of the EU in order more effectively to combat international terrorism.⁸⁹

In 2009 Germany amended its Criminal Code, once again, and, by virtue of an ‘Act on the Prosecution of the Preparation of Serious Violent Acts Endangering the State’, introduced three new provisions that criminalise the preparation by individuals of ‘serious violent acts’ which are capable of ‘endangering’ the State.⁹⁰ Section 89a defines ‘a serious violent offence endangering the State’ as an offence ‘against life’ or ‘against personal freedom’ which is ‘intended to impair and capable or impairing the existence or security of a state or of an international organisation ... or to undermine the constitutional principles of the Federal Republic’.⁹¹ The preparatory offences that constitute a ‘a serious violent offence endangering the State’ and apply outside Germany may be summarised as follows: (i) training or receiving training to commit a serious violent act endangering the State; manufacturing, procuring, providing or storing specified weapons, specified substances or devices needed to carry out the offence prepared, as well as procuring or storing essential items of “precursors” needed to manufacture such weapons, substances, devices; and collecting, accepting or providing funds for the commission of an offence;⁹² and (ii) initiating contacts for the commission of a serious violent act endangering the State.⁹³ Section 89a *inter alia* is applicable outside Germany to the conduct of foreign nationals where an offence is ‘meant to be committed within the territory of the Federal Republic of Germany or against a German citizen.’⁹⁴ Section 89b *inter alia* applies to the act of establishing or maintaining of contacts abroad by foreign nationals but is limited to the territory of the Member States of the EU.⁹⁵

⁸⁸ Joint Action 98/733/JHA of 21 December 1998, O.J. L 87 351 of 29 December 1998, p.1.

⁸⁹ ‘Letter dated 22 October 2002 from the Chargé d’affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism’, U.N. Doc.S/2002/1193 (24 October 2002), at p.14.

⁹⁰ Criminal Code, sections 89a, 89b and 91.

⁹¹ *Ibid.*, section 89(a)(1).

⁹² *Ibid.*, section 89a(1)-(2).

⁹³ *Ibid.*, section 89b.

⁹⁴ *Ibid.*, section 89a(3).

⁹⁵ *Ibid.*, section 89b(3).

The reason why section 89 criminalises certain offences ‘intended to impair and capable or impairing the existence or security of a state or of an international organisation’ is in order to implement the obligation to extradite or prosecute. The amendments made to the domestic law of Germany are intended to implement the binding law of the EU on combatting international terrorism.⁹⁶ It is notable that the laws adopted by the EU were in reaction to the acts of terrorism on 9-11 and comprise measures taken by the EU in order to implement resolution 1373.⁹⁷ This shows that the EU has recognised the transnational nature of the terrorist threat and, in order to implement resolution 1373, has required Member States to establish extraterritorial jurisdiction over certain terrorist and other related offences under the protective principle, as well as under the extradite or prosecute principle in cases where a Member State refuses to hand over or extradite an accused of a relevant offence to another EU country or to a non-EU country.⁹⁸ It is therefore useful to examine resolution 1373.

4.5. The Role of the Security Council in Response to International Terrorism

The approach of the Security Council to combating the problem of international terrorism changed profoundly in response to the terrorist attacks on 9-11. The Security Council determined, for the first time, that all acts of ‘international terrorism’ constitute a ‘threat to international peace and security’ under Chapter VII of the U.N. Charter, rather than its previous approach of making individual determinations of threats to peace and security.⁹⁹ The Security Council, moreover, unanimously adopted resolution 1373.¹⁰⁰ What makes resolution 1373 notably different, and of great importance, is that it was adopted under Chapter VII and is therefore binding on all U.N. Member States. Resolution 1373 is thus of universal scope and application, rather than being confined temporally or to a specific situation or country, as had been previous counter-terrorism resolutions, and ‘imposed uniform, mandatory counter-terrorist obligations on all

⁹⁶ Council Framework Decision 2002/475/JHA, *supra* n 44; Council Framework Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330 of 9 December 2008, p.21.

⁹⁷ Report of the European Union to the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism, U.N. Doc.S/2002/928 (16 August 2002), Annex, at p.9.

⁹⁸ Council Framework Decision 2002/475/JHA, *supra* n 44, Articles 1-4 & 9; Council Framework Decision 2008/919/JHA, *supra* n 96, Article 1.

⁹⁹ S/RES/1368 (12 September 2001), preambular paras.1, 3. See also S/RES/1456 (20 January 2003), preambular para.1; S/RES/1611 (7 July 2005), para.1; S/RES/1617 (29 July 2005), preambular para.1; S/RES/1618 (4 August 2005), para.1; S/RES/1624 (14 September 2005), preambular paras.1, 3; S/RES/1636 (31 October 2005), preambular para.3; S/RES/1805 (20 March 2008), preambular paras.1-2; S/RES/1963 (23 December 2010), preambular para.1.

¹⁰⁰ *Supra* n 4.

States'.¹⁰¹ It is therefore unsurprising that the Security Council is said to have taken on a new 'legislative' role in combating international terrorism.¹⁰² Resolution 1373 required all States to take a number of wide-ranging steps necessary to combat international terrorism. Not only does it require States to become parties 'as soon as possible' to the relevant international conventions relating to terrorism.¹⁰³ It required, moreover, that States provide for specific domestic laws in order to ensure that 'terrorist acts' are established as serious criminal offences and to 'prevent' and 'suppress' such acts; and determined the timetable in which these legislative changes were to be introduced and, to that end, required States to report to the CTC on the steps taken to implement the resolution. Of particular importance to the present work, resolution 1373 envisaged the use by States of extraterritorial jurisdiction for combating international terrorism.

Resolution 1373, by virtue of paragraph 2, required States to prevent and punish a range of 'terrorist acts' and to suppress 'terrorist groups' and bring 'terrorists' to justice. Thus, paragraph 2 provided, amongst other things, that States 'shall (a) [r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists'; '(b) [t]ake the necessary steps to prevent the commission of terrorist acts'; '(c) [d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens'; and '(e) [e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts is brought to justice'. It is apparent that paragraph 2 thus imposed on States negative obligations, such as to 'refrain' from providing either active or passive support to persons involved in 'terrorist acts', as well as positive obligations, such as 'suppressing' the recruitment of 'terrorist groups' and 'eliminating' the supply of weapons to 'terrorists'; take all 'necessary steps to prevent terrorist acts'; and 'ensure'

¹⁰¹ Report of the High-level Panel on Threats, Challenges and Change', U.N. Doc. A/59/565 (2004), at p.50; also Szasz, P.C. (2002). 'The Security Council Starts Legislating'. 96 *AJIL* 901; Happold, M. (2003). 'Security Council Resolution 1373 and the Constitution of the United Nations'. 16 *LJIL* 593; Rosand, E. (2003). 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism'. 97 *AJIL* 333, at p.334; Ward, C.A. (2003). 'Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council'. 8 *J Conflict Security Law* 289; Talmon, S. (2005). 'The Security Council as World Legislature'. 99 *AJIL* 175; Barker, *supra* n 4.

¹⁰² Szasz, *ibid.*, at p.905; Happold, *ibid.*, at p.595; Talmon, *ibid.*, at p.175; Barker, *ibid.*, at p.14; Guillaume, G. (2004). 'Terrorism and International Law'. 54 *ICLQ* 537, at p.543; Special Tribunal for Lebanon, *supra* n 13, para.104.

¹⁰³ *Supra* n 4, preambular para.3. See also S/RES/1368, *supra* n 99, para.4; S/RES/1377 (12 November 2001), para.9; S/RES/1456, *supra* n 99, para.2; S/RES/1566 (8 October 2004), para.4.

that persons who participate in the financing, planning, preparation or perpetration or support of ‘terrorist acts’ are brought to justice.

The type of offences included under paragraph 2, for example, ‘recruitment’, ‘financing’, ‘planning’, ‘support’, ‘preparation’, requires States to take a proactive and preventative approach, and to criminalise conduct early on, before ‘terrorist acts’ are carried out.¹⁰⁴ These provisions are also drafted in broad terms and are not confined to conduct which occurs wholly within the State’s territory or by its own nationals abroad.¹⁰⁵ Nevertheless, paragraph 2 is silent as regards the use and scope of extraterritorial jurisdiction and, by using the term ‘terrorist act’ throughout its operative provisions, fails to emphasise, as does the resolution more generally, the transnational aspects of the activities with which it is concerned. This is rather surprising, given the context in which the resolution was adopted and, as is made clear by the preamble, its focus on ‘international terrorism’.¹⁰⁶ Consequently, on the face of it, resolution 1373 is not clear on the grounds of jurisdiction that States should use in order to implement the resolution in their national laws, or what the scope and application of such jurisdiction should be. This perhaps illustrates one of the dangers of circumventing the treaty-making process, which would otherwise have involved some necessary deliberation by States of grounds of jurisdiction or stipulated the circumstances in which the exercise of such jurisdiction is permissive or mandatory.¹⁰⁷ Nor does resolution 1373 define any of the offences used in it, including key terms such as ‘terrorist’, ‘terrorist group’ and ‘terrorist act’. The lack of definition of any concepts, it has been suggested, was deliberate and the consensus on resolution 1373 by the Security Council’s permanent members depended upon avoiding their definition.¹⁰⁸ The same consideration may apply *mutatis mutandis* to grounds of jurisdiction. The lack of definition of these key concepts, and, in effect, the bypassing of any debate on them, appears to have been

¹⁰⁴ See also Shields, C. *et al.*, ‘Final Report: An Assessment of Defense and Prosecutorial Strategies in Terrorism Trials: Implications for State and Federal Prosecutors’, 2008, at pp.xiv-xv.

¹⁰⁵ See also Saul (2012), *supra* n 13, at p.146; Commonwealth Secretariat (2002), ‘The Model Legislative Provisions on Measures to Combat Terrorism’, at p.21; Wainright, J., ‘Some aspects of compliance with UN Security Council Resolution 1373’, in *The Loophole-Journal of the Commonwealth Association of Legislative Counsel* (ed. by Berry, B.), Issue No.1 of 2005, at p.10; CTC Executive Directorate, ‘Technical Guide to the Implementation of Security Council Resolution 1373 (2001)’, 2009, at pp.19, 30 (Technical Guide).

¹⁰⁶ *Supra* n 4, preambular para.3.

¹⁰⁷ See also Saul (2006), *supra* n 13, at p.269.

¹⁰⁸ See Rosand, *supra* n 101, at p.334; Saul, B. (2005). ‘Definition of “Terrorism” in the U.N. Security Council: 1985-2004’. 4 *Chinese JIL* 141, at p.157; Wainright, *supra* n 105.

important in terms of the speed by which the resolution was enacted, just seventeen days after 9-11. The resolution itself was adopted in just forty-eight hours, after the U.S. had first begun consultations with the Security Council's other four permanent members on 26 September 2001.¹⁰⁹ The resolution was prepared in draft during the Security Council's informal consultations and adopted in a formal public meeting-lasting only five minutes; no Council member spoke on the draft resolution or explained its vote; non-members of the Council were not consulted and were not present.¹¹⁰

4.6. The Extradite or Prosecute Principle and the Role of the Counter-Terrorism Committee

The Security Council remained silent on the matter of jurisdiction in the implementation of resolution 1373 until 2003, with the adoption of a declaration annexed to resolution 1456. The declaration *inter alia* provided that 'States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens, in accordance with international law, in particular, on the basis of the principle of extradite or prosecute'.¹¹¹ The last phrase of this provision is noteworthy, as it is the first time that the Security Council has indicated the method, albeit in a non-exhaustive way, by which States implement paragraph 2 of resolution 1373 and bring to justice those who commit such crimes, including where they occur abroad. The extradite or prosecute principle was subsequently reiterated by the Security Council in resolution 1566, which was adopted under Chapter VII of the U.N. Charter and calls upon States to:

... cooperate fully ... especially with those States where or against whose citizens terrorist acts are committed, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.¹¹²

The Security Council has also used the CTC in order to openly press States, in a climate of haste, to implement the extradite or prosecute principle in their national laws. The CTC, which was established, it will be recalled, by resolution 1373, is made up of members of the Security Council and has as its role the monitoring of the

¹⁰⁹ Talmon, *supra* n 101, at p.189.

¹¹⁰ *Ibid.*

¹¹¹ S/RES/1456, *supra* n 99, para.3.

¹¹² S/RES/1566, *supra* n 103, para.2; also S/RES/1624, *supra* n 99, preambular para.15 and operative para.5; S/RES/1963, *supra* n 99, preambular para.10.

implementation by States of the resolution's requirements. In a report by the CTC to the Security Council in 2004 aimed at identifying the problems encountered in the implementation of resolution 1373, the Chair of the CTC specifically interpreted the offences under paragraph 2(c) and (e) as 'oblig[ing] states to prosecute and try all those responsible for acts of terrorism, wherever they are committed'.¹¹³ According to the CTC's Chair, [t]his measure is designed to ensure that terrorists have no place of refuge, since each State will be competent to try them or extradite them'.¹¹⁴ The Chair reported that 'some States have shown certain reluctance to create such mechanism in their legislation.'¹¹⁵ As a way of circumventing such reluctance, the CTC has, in its dialogue with States, prioritised the ratification of counter-terrorism treaties, given that such agreements contain provisions on extradite or prosecute, 'so as to create an international cooperation network and institutional machinery for mutual assistance and extradition'.¹¹⁶

The matter of extraterritorial jurisdiction was not returned to by the Security Council until seven years after the adoption of resolution 1373. The Security Council requested the CTC, in 2008, to prepare an initial survey of State practice in order to assess the resolution's implementation in national laws.¹¹⁷ In 2008 a group of experts of the CTC prepared an initial survey of State practice, which was based on, amongst other things, information provided by States and visit reports, none of which are publicly available.¹¹⁸ One of the 'thematic areas' examined by the experts is the implementation of paragraph 2 of resolution 1373 in national laws and, in particular, whether the '[j]urisdiction of courts extends to acts committed abroad by nationals or foreign nationals currently within the State'.¹¹⁹ The experts regarded jurisdiction as being 'adequate' where States have incorporated into their national laws the extradite or prosecute principle, although it is not explained by the report whether the survey of State practice focused on the use of this principle in respect of offences set forth in paragraph 2 of resolution 1373, in addition to those included in counter-terrorism

¹¹³ 'Report by the Chair of the Counter-Terrorism Committee on the Problems Encountered in the Implementation of Security Council Resolution 1373 (2001)', U.N. Doc.S/2004/70 (2004), Annex, at p.6. Cf. Betti, S. (2006). 'The Duty to Bring Terrorists to Justice and Discretionary Prosecution'. 4 *JICJ* 1104.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ S/RES/1805, *supra* n 99.

¹¹⁸ CTC Report (2008), *supra* n 43.

¹¹⁹ *Ibid.*, Annex.

treaties. Nor does the report explain the meaning of extradite or prosecute in international law, or the reason why jurisdiction arising out of this principle is regarded as ‘adequate’ and prioritised in the assessment of the implementation of resolution 1373. In that connection, the report does not provide any analysis of grounds of jurisdiction or whether, and, if so, to what extent, these grounds are evidenced in State practice in the implementation of resolution 1373.

The CTC subsequently prepared, at the Security Council’s request, an updated survey of State practice in 2009. The only comment made by experts on the matter of jurisdiction related to terrorist financing, the countering of which ‘lies at the heart of Security Council resolution 1373’.¹²⁰ The experts suggested that as regards the obligation to criminalise terrorist financing, as required by resolution 1373 and the Terrorist Financing Convention,¹²¹ ‘the jurisdiction of the courts does not generally extend to acts committed outside the State’s territory by foreign nationals currently within the State, except where the offence aims at undermining State security or counterfeiting the legal tender.’¹²² The CTC regarded the jurisdiction of these States, which appears to be based on the protective principle, as a ‘shortfall’.¹²³ The reason for this is twofold. First, a ‘significant number’ of States have either not yet criminalised terrorist financing or have introduced a terrorist financing offence that does not reflect the offences set forth either in resolution 1373 or the Terrorist Financing Convention. Second, these States have not made provision in their national laws for jurisdiction under the extradite or prosecute principle in respect of terrorist financing offences committed abroad.

The CTC updated the 2009 survey in 2011. The only comment made by the experts on the matter of jurisdiction is that the legislative measures which States are obliged to take in implementing resolution 1373 ‘must be supported by adequate jurisdiction to ensure that domestic courts are competent to deal with potential offenders. This includes the obligation to extradite or prosecute in accordance with applicable counter-terrorism

¹²⁰ CTC Report (2009), *supra* n 43, at p.44.

¹²¹ *Supra* n 59.

¹²² *Supra* n 120.

¹²³ *Ibid.*

instruments to which they are parties.’¹²⁴ In relation to the ‘gaps’ identified by the experts in the implementation of resolution 1373, the experts suggested that:

[f]ull implementation of the obligation to bring terrorists to justice under the principle *aut dedere aut judicare* (“extradite or prosecute”) requires the adoption of implementing legislation in more States and a strengthened commitment to prosecute terrorism cases where extradition is not feasible.¹²⁵

The assessment by the CTC of extraterritorial jurisdiction in State practice, in the implementation of resolution 1373, thus appears to have focused solely and exclusively on the provision made by States for the extradite or prosecute principle in accordance with counter-terrorism treaties.¹²⁶ No analysis has been expressly provided by the CTC on the extent to which States have made provision for jurisdiction arising out of this principle in the implementation of offences set forth in resolution 1373 itself. Nor has any express consideration been given by the CTC to other grounds of jurisdiction in international law, for example, under the protective principle, and the potential coordination of such jurisdiction in national laws in the implementation of resolution 1373. It is therefore not clear what the experts *inter alia* mean by the phrase ‘adequate jurisdiction’, other than jurisdiction arising out of the extradite or prosecute principle. The CTC has not explained the reasons why some States are apparently reluctant to make provision for extraterritorial jurisdiction under the extradite or prosecute principle in their national laws.

This brief analysis shows that the Security Council, both directly, in the form of resolutions adopted under Chapter VII, and indirectly, through the monitoring and dialogue of the CTC in the national implementation of resolution 1373, has promoted, and, indeed, demanded, that States make provision in their national laws for extraterritorial jurisdiction over terrorist offences committed abroad, including where such offences are perpetrated by foreign nationals, pursuant to the extradite or prosecute principle. Yet the Security Council has not commented on the rationale of this principle or the reason why explicit prominence has been given to it for combatting international

¹²⁴ ‘Global Survey of the Implementation of Security Council Resolution 1373 (2001) by Member States’, U.N. Doc.S/2011/463 (1 September 2011), at p.71.

¹²⁵ *Ibid.*, at p.7.

¹²⁶ CTC Report (2008), *supra* n 43, at pp.5, 6, 10, 15, 19, 21, 23, 37, 47; CTC Report (2009), *supra* n 43, at pp.14, 22, 30, 43, 60. See also Technical Guide, *supra* n 105; UNODC (2009), ‘Draft Model Legislative Provisions against Terrorism’, available online: www.un.org/en/sc/ctc/docs/bestpractices/undoc_modellegislation.doc.

terrorism. Nor has the Security Council explained the grounds of jurisdiction that States may use ‘in accordance with international law’ in the implementation of resolution 1373,¹²⁷ or, for that matter, which of these grounds, if any, arises out of the extradite or prosecute principle. The Security Council has thus obliged States to make provision for extraterritorial jurisdiction but has not provided for a clear and coherent legally binding jurisdictional framework, or promoted uniformity and complementarity in national laws, in the implementation of resolution 1373.

The highly controversial relationship between extradite or prosecute and the theory of universal jurisdiction may explain the reason why the Security Council and the CTC have refrained from commenting on it. Indeed, there is fundamental disagreement among States, including the Security Council’s permanent members, on the meaning of extradite or prosecute and its relationship with universal jurisdiction.¹²⁸ It is certainly the case that the phrase ‘extradite or prosecute’ is sufficiently broad to permit unilateral interpretations of resolutions by States, or what has been described elsewhere by Yee as the ‘dynamic interplay’ of interpretation, each of whom may have different understandings and *opinio juris* as to its meaning.¹²⁹ This may explain why the Security Council has, on the one hand, been able to adopt binding resolutions on extradite or prosecute and, on the other, has remained silent on grounds of jurisdiction.

The reason why priority has been given by the Security Council to the obligation to extradite or prosecute may also be because one of the major concerns among the Council’s members is the threat of terrorist acts being committed against themselves and certain of their vital interests and the perpetrators taking refuge in the territory of foreign States. In order to understand this concern, consideration has to be had to the role of the Security Council, acting under Chapter VII, to combat international

¹²⁷ S/RES/1456, *supra* n 99, para.3.

¹²⁸ E.g., compare Sixth Committee, Information from and observations by China on the scope and application of the principle of universal jurisdiction (2010), para.6; Sixth Committee, A/C.6/64/SR.13 (24 November 2009), para.16 (Russia); Sixth Committee, France, The scope and application of the principle of universal jurisdiction, Note submitted to the Office of Legal Affairs pursuant to General Assembly resolution 64/117 of 16 December 2009 (27 April 2010); Sixth Committee, U.S. Submission Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction (2010); Sixth Committee, U.K., Scope and application of the principle of universal jurisdiction, Note submitted to the Office of Legal Affairs pursuant to General Assembly resolution 65/33 of 6 December 2010 (15 April 2011).

¹²⁹ Yee, S. (2012). ‘The Dynamic Interplay between the Interpreters of Security Council Resolutions’. 11 *CJIL* 613, at p.616.

terrorism, starting with the Lockerbie incident and the bombing of the U.S. embassies in East Africa in the 1990s.¹³⁰ The obligation to extradite or prosecute, as will be explained in chapter five, enables the States whose vital interests have been threatened or injured by acts of terrorism to obtain the custody of alleged offenders taking refuge in the territory of other States, including any person ‘who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts’.¹³¹ The U.S., it will be recalled, sponsored resolution 1373 in response to 9-11 and, it would appear, the continuing threat to the U.S., and ‘United States nationals and interests in the United States and abroad’, by members of al-Qaeda taking refuge abroad.¹³² As was made clear by the Security Council in resolution 1566, above, which was proposed by Russia following an act of terrorism committed against Russian nationals, States have a duty to ‘... cooperate fully ... *especially with those States where or against whose citizens terrorist acts are committed* ... on the basis of the principle to extradite or prosecute’.¹³³ Alternatively, the States seeking extradition of alleged offenders are able to have such persons prosecuted on their behalf where, in the words of the experts of the CTC, above, ‘extradition is not feasible’.¹³⁴ It is worth noting, by way of aside, that the Security Council may potentially be able to impose sanctions on States in order to coerce them to extradite alleged offenders taking refuge on their territory and without the legality of such measures being subject to judicial review by the ICJ, given that the obligation to extradite or prosecute is required by resolutions under Chapter VII and therefore may fall outside the ICJ’s jurisdiction.¹³⁵ The

¹³⁰ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v U.K.)*, Provisional Measures, I.C.J. Reports 1992, p.3; S/RES/1189 (13 August 1998), paras.1 & 3; S/RES/1214 (8 December 1998), para.13; S/RES/1193 (28 August 1998), para.15; S/RES/1267 (15 October 1999), para.1; U.S. embassy (Islamabad), Cable, Osama bin Laden: Taliban spokesperson seeks new proposal for resolving bin Laden problem’, 28 November 1998; U.S. embassy (Islamabad), Cable, ‘Pakistan: Ambassador Raises bin Laden with Foreign Secretary Shamshad Ahmed’, 6 October 1998; U.S. embassy (Islamabad), Cable, ‘Usama bin Laden: Coordinating our Efforts and Sharpening our Message on bin Laden’, 19 October 1998, available online: www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB134/index2.htm; also White, N.D., ‘The United Nations and Counter-Terrorism: Multilateral and Executive Law Making’, in De Friás *et al.*, *supra* n 13, at pp.67-68; Grant, J.P. (2004). ‘Beyond the Montreal Convention’. 36 *CaseW.Res.J.Int’lL.* 453, at pp.457-458; Murphy, S.D. (ed.) (2000). ‘Efforts to Obtain Custody of Osama Bin Laden’, 94 *AJIL* 366. See further chapter five.

¹³¹ S/RES/1373, *supra* n 4, para.2(c); S/RES/1566, *supra* n 103, para.2.

¹³² Letter dated 7 October 2001 from the Permanent Representative of the U.S. to the U.N. Addressed to the President of the Security Council, U.N. Doc.S/2001/946 (7 October 2001).

¹³³ S/RES/1566, *supra* n 103, para.2 (italics added).

¹³⁴ *Supra* n 125.

¹³⁵ On the potential judicial review of Security Council resolutions, see Tladi, D. & Taylor, G. (2011). ‘On the Al Qaida/Taliban Sanctions Regime: Due Process and Sunsetting’. 10 *CILJ* 771; Yee, *supra* n 129, at p.618.

prescriptive jurisdiction arising out of the extradite or prosecute obligation is necessarily broad so as to enable this mutually beneficial protection. At the same time, this prescriptive jurisdiction is sufficiently broad for States to criminalise offences committed abroad, including where such offences are deemed to threaten their own vital interests, which may be enforced as soon as the accused is present in the legislating State's territory; and the legislating State does not have to evidence any prescriptive connection with the alleged offence. All that has to be proven by the legislating State is that the accused is 'present' or 'found' on its territory.¹³⁶ This means that States are able to provide for broad prescriptive jurisdiction without the burden of having to expressly refer to or evidence the vital interests that they are seeking to protect.

4.7. Concluding Remarks

This chapter has presented the key findings of empirical research into State practice and a detailed analysis of national laws, the purpose of which is to shed important light on whether, and, if so, to what extent, protective jurisdiction is used in contemporary State practice for combatting the threat of international terrorism. As has been shown, protective jurisdiction has been used to varying degrees in the national laws of 160 States. This ground of jurisdiction appears to be at the heart of the legislative response to, and is the principal means by which States combat, the threat of international terrorism. The present chapter does not claim to be comprehensive and is limited to national laws dealing with acts of terrorism and related offences. Notwithstanding the different and divergent ways in which 'terrorism' and other substantive crimes have been defined in national laws, such practice may be sufficiently uniform and widespread so as to support the finding that protective jurisdiction is a customary rule and permit codification. This finding is of great importance, for at least two reasons. The first of these is that protective jurisdiction is little understood and tends either to be overlooked or defined narrowly by courts and in legal scholarship. The consequence is that protective jurisdiction may not be used to the full extent permitted by custom and/or other grounds of jurisdiction invoked, inappropriately, in its stead. There is also a considerable amount of confusion and uncertainty by some courts and in legal scholarship as to the most appropriate grounds of jurisdiction for combatting the threat of international terrorism. Second, the ILC has recently decided to include

¹³⁶ E.g., *Yousef*, *supra* n 22; *Yunis*, *supra* n 16; *U.S. v Shi* 396 F.Supp.2d, at p.1132, affirmed by *U.S. v Shi*, 525 F.3d709 (9th Cir., 2008), at pp.722, 724-725; *U.S. v Bout*, 12-1487-cr (2nd Cir., 2013).

‘Extraterritorial jurisdiction’, with a view to the codification of protective jurisdiction, in its long-term programme of work.¹³⁷ The ILC has also alluded to the relevance of protective jurisdiction for combating transnational crimes, including international terrorism. The findings of the present chapter provide a strong argument in support of the codification of protective jurisdiction and could inform the preliminary work of the ILC. The codification of protective jurisdiction is discussed in further depth in chapter six.

The chapter has made an effort, where possible, to systematise the offences contained in these national laws into categories where they appear to be of a similar subject-matter. Given that protective jurisdiction has been used over a broad range of offences and there are many different and diverging definitions of ‘terrorism’, it has to be borne in mind that these categories are not self-contained and overlap. The reason for categorising offences in this way is in order to assist analysis in the identification of more common themes and general trends in national laws on jurisdiction. Some of these categories are supported by the national laws of very few States. On the other hand, 17 of them have broader support in national laws. It is on the basis of these categories of offences, as well as treaty and Security Council practice, that chapter five will enumerate some of the vital interests that have been included under the ambit of protective jurisdiction *lex lata* and around which a basic level of agreement appears to have clustered. In turn, chapters five and six, respectively, will propose the definition and codification of protective jurisdiction based on vital State interests, a core category of which are shared by the international community. This approach differs from defining protective jurisdiction based on a uniform list of specified offences, which would be difficult, if not impossible, to harmonise, and is not entirely appropriate for responding to the complex and evolving threat of international terrorism. The importance of vital interests being shared is that, at the very least, it goes some way to explaining the reason why States regard international terrorism as a serious threat, and provides a useful starting point for debate by the ILC and may facilitate agreement in the codification of protective jurisdiction.

The trend in State practice identified by the present chapter is not new but appears to have been facilitated in recent years by the increasing, albeit selective, role of the

¹³⁷ *Supra* n 8.

Security Council in taking measures against international terrorism under Chapter VII, in particular, the adoption of resolution 1373. This resolution requires States to make provision for extraterritorial jurisdiction. However, the Security Council has not explained either in this or in subsequent resolutions applicable grounds of extraterritorial jurisdiction in the implementation of resolution 1373. Rather, having remained silent for two years following the adoption of resolution 1373, the Security Council has subsequently required States to make provision for extraterritorial jurisdiction under the extradite or prosecute principle; to that end, the Council has used the CTC to openly press States to make provision for jurisdiction pursuant to this principle.

The Security Council and the CTC have not been prepared to explain the rationale of extradite or prosecute or the reason why priority has been given to it. Nor have they explained grounds of extraterritorial jurisdiction or, for that matter, which ground of jurisdiction, if any at all, arises out of the extradite or prosecute principle. The reason for this may be because there is no existing treaty on grounds of jurisdiction and such grounds are subject to considerable confusion and would require negotiation. There is also fundamental disagreement, including among the Security Council's members, on the relationship between universal jurisdiction and extradite or prosecute.¹³⁸ It may be the case that, as with the definition of 'terrorism', the Security Council, as a political organ, probably does not want to become bogged down in such legal matters and has simply negotiated around them. The notion that one State's 'terrorists' are another State's legitimate freedom fighters and the absence of an agreed legal definition of 'terrorism', as is indicated no clearer than the Security Council's practice, would suggest that it is inappropriate to interpret extradite or prosecute as impliedly codifying a ground of 'universal jurisdiction'. The empirical analysis of State practice by the present chapter has not found evidence of sufficiently widespread and uniform practice to suggest that universal jurisdiction is an appropriate ground of jurisdiction for combatting international terrorism or for interpreting extradite or prosecute as a ground of universal jurisdiction.

The absence of a clear and legally binding jurisdictional framework means that an international community of nearly 200 States does not have an authoritative guide, or, at

¹³⁸ Chapter five.

the very least, a point of reference, in the implementation of resolution 1373. This risks creating an insufficient degree of uniformity, coherence and complementarity among national laws in combatting international terrorism, particularly as States define ‘terrorism’ and related offences in radically different and sometimes overly vague ways. The experts of the CTC have stated that ‘essential’ to the effective implementation of resolution 1373 is the need ‘to establish a comprehensive and coherent legal framework on counter-terrorism’; they continued: ‘[a]lthough many States have introduced extensive penal legislation covering various criminal acts, such legislation often lacks the requisite specificity, comprehensiveness and complementarity.’¹³⁹ While the experts *inter alia* were referring to the significant concern raised by the vague, overbroad and widely divergent definitions of ‘terrorism’ and other related offences in national laws,¹⁴⁰ the same point applies *mutatis mutandis* to the scope and application of extraterritorial jurisdiction. In that regard, it is one thing to oblige States to extradite or prosecute persons accused of specific offences contained in counter-terrorism treaties but is it quite another to impose the same obligation over ‘terrorism’ and ‘terrorist acts’ and other related concepts used by resolution 1373, none of which the Security Council or the CTC have been willing to define.¹⁴¹

The absence of a jurisdictional framework is also surprising, given that resolution 1373 constitutes a cornerstone of the international legal framework for countering international terrorism, and extraterritorial jurisdiction is one of the most important measures in international law, not involving the use of force, by which States are able to combat it. It also gives rise to legal uncertainty in terms of the most appropriate grounds of jurisdiction for implementing resolution 1373 and combatting international terrorism. The priority given to the extradite or prosecute principle by the Security Council, without any further explanation, leaves unexplained in qualitative terms the reason why international terrorism is deemed by States as a serious threat, or the interests that States seek to protect in its criminalisation and suppression. One of the advantages of the adoption of an instrument codifying protective jurisdiction, as will be explained in

¹³⁹ CTC Report (2008), *supra* n 43, at pp.29-30; CTC Report (2009), *supra* n 43, at p.43.

¹⁴⁰ CTC Report, 2008, *ibid.*, at p.34; CTC Report (2009), *ibid.*, at p.48; also ‘Statement by Professor Martin Scheinin, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism to the Counter-Terrorism-Committee of the Security Council’, New York (24 October 2005), para.7; ‘Address of UN High Commissioner for Human Rights Navanethem Pillay to the Counter-Terrorism Committee of the Security Council’, New York (29 October 2009), at p.6.

¹⁴¹ Saul (2006), *supra* n 13, at p.265.

chapter six, is that it could provide a persuasive guide for States in the adoption of national laws and the implementation of Security Council resolutions, as well as fill in gaps left by the existing international legal regime of counter-terrorism treaties.

As has been explained, above, the reason why the Security Council has given priority to the extradite or prosecute principle appears to be due to a serious concern by the Council's members that terrorist acts may be committed against themselves and certain of their vital interests by persons taking refuge abroad. On the one hand, extradite or prosecute provides for a mutually beneficial means by which States that have a connection with an alleged offence, including threats to certain of their vital interests, are able to obtain the custody of the accused, or, failing extradition, have criminal proceedings initiated against the accused on their behalf. The Security Council may even have the ability to coerce States under Chapter VII to extradite alleged offenders who are present on their territory without having those measures subject to judicial review by the ICJ. On the other, the prescriptive jurisdiction arising out of the principle is sufficiently broad to enable States to criminalise offences committed abroad, including where such offences are deemed to threaten their own vital interests, which may be enforced as soon as the accused is present in the legislating State's territory; and the legislating State is not required to establish any prescriptive connection with the alleged offence. All that has to be proven by the legislating State is that the accused is 'present' on its territory. This means that States are able to provide for broad prescriptive protective jurisdiction, which is grounded in treaty rather than custom, without the burden of having to expressly refer to or evidence the vital interests that they are seeking to protect. This alternative explanation of extradite or prosecute, at least within the context of counter-terrorism, is explained further in the following chapter.

Given that the prescriptive jurisdiction arising out of extradite or prosecute has been widely interpreted by some States and courts and in legal scholarship in recent years as the implied codification of universal jurisdiction, the following chapter examines the relationship between these two concepts and shows that treating them as one and the same appears to confuse jurisdiction for the protection of 'shared vital State interests' and 'international community values'. Thus, before discussing the advantages and disadvantages of codifying protective jurisdiction, in chapter six, it is important to

enumerate some of the vital interests that have been included under protective jurisdiction *lex lata* and explain the fundamental conceptual distinction between ‘shared vital State interests’ and ‘international community values’.

Chapter Five

‘Defining Protective Jurisdiction in Contemporary Customary International Law: A ‘Shared Vital State Interests’ Approach’

5.1. Introduction

Theories relating to grounds of extraterritorial jurisdiction in contemporary customary international law are little understood and often subject to confusion, and protective jurisdiction is no exception. One of the reasons accounting for this is that the protective principle, as with other grounds of jurisdiction, has yet to be codified. The issue of whether it is possible to define the protective principle and, if so, the form that this ought to take, has remained contested in legal scholarship since the efforts were made to codify extraterritorial jurisdiction by the League of Nations.¹ There is thus a lack of clarity and certainty on the definition of protective jurisdiction, but also its scope and application, in contemporary international law.

The purpose of this chapter is to shed important light on the definition of protective jurisdiction. One approach to defining this jurisdiction is to specify a list of offences over which the principle is applicable. However, this approach is problematic in that it may be difficult, if not impossible, to harmonise national laws, in particular widely divergent definitions of ‘terrorism’.² The present chapter adopts an alternative approach and proposes that it may be possible to define protective jurisdiction, *lex lata*, based on vital interests. It does so by building on the detailed empirical analysis of State practice in chapter four and trying to deduce from that practice some of the vital interests that have been included under the ambit of the principle and around which a basic level of agreement appears to have clustered. The reason for proposing this approach is twofold. First of all, vital interests are at the heart of protective jurisdiction and provide its *raison d’être*.³ That said, vital interests are, generally speaking, not defined by national laws and treaties establishing extraterritorial jurisdiction. The type of vital interests that fall under protective jurisdiction as a matter of the law *lex lata*, as opposed to the perspective of *lex ferenda*, is therefore little understood by courts and in legal scholarship. The International Law Commission (ILC) has recently decided to include

¹ Chapter three.

² Chapter four.

³ Chapter two.

the topic of extraterritorial jurisdiction in its long-term programme of work and the ILC Secretariat has alluded to the need to consider vital interests in combatting international terrorism. Thus, the time is ripe for the re-examination of vital interests. Second, this approach to defining protective jurisdiction is not new and, it will be recalled from chapter three, was proposed by the Harvard Research in 1935.⁴

However, what makes the present chapter different from the Harvard Research is that it enumerates a number of vital State interests that are shared by the international community. That is, the protection of such interests is sufficiently uniform in the practice of the community of States. This approach to defining protective jurisdiction is referred to in the present chapter as the ‘shared vital State interests’ approach. A similar approach has already been proposed *lex ferenda* by the Select Committee of Experts on Extraterritorial Jurisdiction, set up by the European Committee on Crime Problems.⁵ The Committee of Experts *inter alia* referred to this approach as the ‘shared values approach’.⁶ The shared values approach was proposed as a way of delimiting grounds of jurisdiction under customary international law generally, rather than as a way of defining protective jurisdiction specifically. The meaning of ‘values’, as will be explained below, is overly vague and the Committee of Experts did not provide any explanation of what such values may comprise. More fundamentally, it risks confusing grounds of protective and universal jurisdiction; and, conceptually, it conflates the protection of vital State interests, which may be shared by the international community, with ‘international community values’, as they will be referred to by the present chapter, under the theory of universal jurisdiction. For these reasons, the present chapter does not adopt the ‘shared values approach’.

There is, however, a further important reason why the focus of the present chapter is on ‘shared vital State interests’, as distinct from ‘values’. The development of jurisdiction over piracy, and its subsequent expansion over war crimes in the aftermath of World War II, for the protection of certain shared vital State interests has been widely misinterpreted as the protection of international community values based on a theory of

⁴ Research on International Law under the Auspices of the Harvard Law School, Part II, ‘Jurisdiction with Respect to Crime’. 29 *AJIL (Supp.)*(1935) 435 (Harvard Research).

⁵ Council of Europe, European Committee on Crime Problems (1992). ‘Extraterritorial Criminal Jurisdiction’, reprinted in 3 *CLF* 441, at p.468.

⁶ *Ibid.*

universal jurisdiction.⁷ This collective belief *inter alia* would appear to have repeated itself in recent years, once again, in respect of the obligation to extradite or prosecute, a principle that has, starting with the 1949 Geneva Conventions, been used in more than sixty treaties, including counter-terrorism treaties.⁸ The present chapter suggests that the extradite or prosecute principle in counter-terrorism treaties should not, on closer inspection, be automatically interpreted as the exclusive treaty codification of a customary rule of universal jurisdiction for the protection of international community values. Rather, the chapter proposes an alternative interpretation. As will be explained below, the reason why extraterritorial jurisdiction arising out this principle does not explicitly require a prescriptive connection between a legislating State and an alleged offence committed abroad is necessary for States parties to implement the obligation to extradite or prosecute, the purpose of which is more effectively to protect their own sovereignty and certain of their vital interests. Thus, the party in whose custody the accused is present is obliged, failing extradition to the party that has a connection with the alleged offence, to initiate criminal proceedings on the latter's behalf. The prescriptive jurisdiction arising out of the extradite or prosecute principle is also sufficiently broad to encompass offences that implicate a party's vital interests but which do not, or cannot be evidenced, to fall within one of the more narrowly defined circumstances specified by the relevant treaty. In the latter case, all that has to be evidenced by the legislating State is the presence of the accused on its territory. There is thus a fundamental conceptual distinction that needs to be made, for the purpose of distinguishing more clearly grounds of protective and universal jurisdiction, between the protection of 'shared vital State interests' and 'international community values'.

The chapter concludes that, based on State, treaty and U.N. Security Council practice, 13 vital State interests, 10 of which are shared by the international community, have been included under the ambit of protective jurisdiction *lex lata*. This finding could provide a useful basis on which to begin a more informed discussion on the codification of protective jurisdiction by the ILC.

The chapter begins, in part two, by examining in depth a fundamental conceptual distinction between 'shared vital State interests' and 'international community values'.

⁷ Chapter three.

⁸ See U.N. Doc.A.CN.4/630 (18 June 2010).

It shows that the interpretation of extradite or prosecute as the implicit codification of a theory of universal jurisdiction for the protection of international community values has been accepted uncritically by courts and commentators, which have persistently either relied on tentative, secondary material, or cited primary materials, wholly out of context. It also appears to be based, *a priori*, on a collective belief: namely that the protection of such values on the basis of universal jurisdiction already exists as an indisputable customary rule in respect of piracy and war crimes, and has done so historically, and can simply be analogised with the extradite or prosecute principle and expanded to include a broad range of treaty crimes. These issues are illustrated no better, perhaps, than the recent decision by the International Court of Justice (ICJ) in the case of *Belgium v Senegal*.⁹ As will be explained, the way in which the ICJ described extradite or prosecute as ‘universal jurisdiction’, absent, as it is, of any reasoning, simply amounts to a bald *ipse dixit*, and what the ICJ meant by ‘universal jurisdiction’ is thus open to question.

Part three suggests that, on closer inspection, the prescriptive jurisdiction arising out of the extradite or prosecute principle is equally capable of interpretation as a form of ‘treaty-based’ extraterritorial jurisdiction. States parties to the relevant treaties concerned are able to use this mutually beneficial treaty-based jurisdiction in order more effectively to protect, or have protected on their behalf by other parties, their own sovereignty and certain of their vital interests, some of which are shared by the international community. This alternative interpretation of extradite or prosecute, it has to be stressed from the outset, is limited, for the purposes of this present analysis, to counter-terrorism treaties, given that the empirical research into State practice, in chapter four, includes national laws implementing extradite or prosecute contained in these treaties and that the focus of the present study is on international terrorism. That said, the extradite or prosecute principle in counter-terrorism treaties is modelled on the same principle used in approximately three-quarters of the multilateral treaties dealing with criminal matters that have been adopted since 1970.¹⁰ The present analysis could thus have broader implications. It is also worth noting that the aim this analysis is not to challenge the validity of universal jurisdiction in contemporary customary international

⁹ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, I.C.J. Reports 2012, p.32.

¹⁰ U.N. Doc.A/68/10 (2013), Annex A, paras.19, 21; U.N. Doc.A/CN.4/L.829 (2013), at pp.6-10.

law; rather, it is to show that extradite or prosecute in counter-terrorism treaties and the theory of universal jurisdiction have different rationales - and are capable of protecting different values and interests - in the prevention of impunity. Having examined the distinction between shared vital State interests and international community values, the chapter then considers, in part five, existing approaches used to define protective jurisdiction and explains the reason for focusing on vital interests. The final part of the chapter enumerates some of the vital State interests that have been included under the protective principle *lex lata* and analyses some of these interests in order to show that they are shared by the international community.

5.2. A Fundamental Conceptual Distinction: ‘Shared Vital State Interests’ and ‘International Community Values’

Before examining some of the vital interests that have been included under the ambit of protective jurisdiction *lex lata*, it is important first to explain in some depth a fundamental conceptual distinction between ‘shared vital State interests’ and ‘international community values’. The reason for making this distinction is that, since the Harvard Research codified grounds of jurisdiction *lex ferenda*, in 1935, there has developed an unfounded collective belief. It will be recalled from chapters one and three that this belief, which has largely gone unquestioned, has developed out of haphazard analyses of State practice and the overreliance on tentative, secondary sources of evidence of customary international law. It posits that the protection of ‘international community values’ under a theory of universal jurisdiction has developed as a customary rule for the past several hundred years over piracy and expanded to include crimes under international law in the aftermath of World War II. This belief appears to have repeated itself, once again, in recent years in respect of the treaty obligation to extradite or prosecute. This raises a broader question of the way in which extradite or prosecute in counter-terrorism treaties and its relationship with universal jurisdiction in international law should be interpreted, to which this chapter will now turn.

5.2.1. Obligation to Extradite or Prosecute and Universal Jurisdiction

Since the mid-twentieth century, starting with the 1949 Geneva Conventions, more than sixty treaties, including counter-terrorism treaties, have been elaborated to include the extradite or prosecute principle.¹¹ This principle obliges the parties to relevant treaties to

¹¹ *Supra* n 8.

establish extraterritorial jurisdiction in their national laws over specified offences occurring abroad in the absence of an explicit prescriptive connection between the impugned conduct and the interests of the legislating State. Thus, at first glance, the extradite or prosecute principle would appear to represent the implicit embodiment or codification of a theory of universal jurisdiction under customary international law, while the national laws implementing such treaties would appear to evidence widespread State practice in support of universal jurisdiction. It should, perhaps, be of little surprise that this is the way in which extradite or prosecute has been interpreted in recent years by some States and judicial opinions,¹² members of the ILC,¹³ non-governmental organisations,¹⁴ as well as in legal scholarship.¹⁵ This form of jurisdiction is sometimes referred to as ‘conditional’ or ‘subsidiary’ universal jurisdiction, on the basis that a party has an obligation to enforce such jurisdiction upon the accused’s presence on its territory.¹⁶ The U.N. Office on Drugs and Crime (UNODC), in its

¹² Council of Europe, *supra* n 5, at p.453; *U.S. v Layton* 509 F.Supp.212 (N.D.Cal., 1981); *U.S. v Yunis* 924 F.2d.1086 (D.C.Cir., 1991), at p.1091; *U.S. v Bin Laden*, 92 F.Supp.2d.189 (S.D.N.Y., 13 March 2000), at p.215; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p. Pinochet Ugarte (No 3)* [1999] 2 All ER 97, at p.111 (Lord Browne-Wilkinson); *ibid.*, at p.177 (Lord Millett); Special Tribunal for Lebanon (Appeals Chamber), Interlocutory Decision on the Applicable Law, *Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/1, 16 February 2011, para.86 & note 134; U.N. Doc.A/65/181 (2010), paras.21-22; Sixth Committee, ‘The scope and application of the principle of universal jurisdiction: information provided by Spain’, Note submitted to the Office of Legal Affairs pursuant to General Assembly resolution 64/117 of 16 December 2009 (12 November 2010), at pp.9-11; Council of the European Union, ‘The AU-EU Expert Report on the Principle of Universal Jurisdiction’, Doc.8672/1/09, REV1 (16 April 2009), para.11 (Expert Report).

¹³ U.N. Doc.A/49/10 (1994), para.200; ILCYB, vol.II (Part II) (1996), paras.5-7 ; U.N. Doc.A.CN.4/630, *supra* n 8, para.94.

¹⁴ Institute of International Law (Rapporteur C. Tomuschat), ‘Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes’, Krakow, 2005, para.2 (Institute); Sixth Committee, ICRC, Information and Observations on the Scope and Application of Universal Jurisdiction, Note submitted to the Office of Legal Affairs pursuant to General Assembly resolution 65/33 (30 April 2013); ALI, Restatement of Foreign Relations Law of the U.S. (Third), Washington, D.C. (1987), para.404.

¹⁵ Expert Report, *supra* n 12, paras.11,16 ; Cryer, R., ‘Zardad’, in Cassese, A. *et al.* (eds.). (2009). ‘Oxford Companion to International Criminal Justice’. Oxford: OUP, at p.979; Cryer, R. & Friman, H. & Robinson, D. & Wilmschurst, E. (2010). ‘An Introduction to International Criminal Law and Procedure’. Cambridge: CUP, at pp.51-53; D’Aspremont, J. (2010). ‘Multilateral versus Unilateral Exercises of Universal Jurisdiction’. 43 *Isr.L.Rev.* 301, at pp.305-306; Kreß, C. (2006). ‘Universal Jurisdiction over International Crimes and the *Institut de Droit International*’. 4 *JICJ* 561, at pp.566, 568, 573-576; O’Keefe, R. (2004). ‘Universal Jurisdiction: Clarifying the Basic Concept’. 2 *JICJ* 735, at pp.747, 755; O’Keefe, R. (2009). ‘The Grave Breaches Regime and Universal Jurisdiction’. 7 *JICJ* 811, at pp.812, 814, 817, 826; Saul, B. (2011). ‘Legislating from a Radical Hague: The UN Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism’. 24 *LJIL* 677, at pp.682, 690; Scharf, M.P., ‘Jurisdiction with Respect to Crime: Universal Jurisdiction and the Harvard Research’, in Grant, J.P. & Barker, J.C. (eds.) (2007). ‘Harvard Research in International Law: Contemporary Analysis and Appraisal’. Buffalo: William S. Hein & Co., Inc., at p.283.

¹⁶ U.N. Doc.A/65/181, *supra* n 12; Institute, *supra* n 14, para.3(b); *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, Judgment, I.C.J. Reports 2002, p.3, at pp.43-44 (Sep. Op. Judge Guillaume); Abi-Saab, G. (2003). ‘The Proper Role of Universal Jurisdiction’. 1 *JICJ* 596, at p.601; Cassese, A. (2003). ‘Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction’. 1 *JICJ* 589, at pp.592-

examination of the applicable grounds of jurisdiction for combatting international terrorism, in the light of counter-terrorism conventions and Security Council resolution 1373, has suggested that ‘the most important form of jurisdiction’ that States are required to establish is extradite or prosecute, the corollary of which ‘means the establishment of universal jurisdiction’ in national laws.¹⁷ The ‘purpose’ of such jurisdiction is for ‘ensuring that there is no safe haven for terrorists’.¹⁸ The justification for the use of universal jurisdiction over terrorist acts, suggested the UNODC, is that:

[c]ertain interests warrant universal protection. These involve the interests of the international community. In such instances the universality principle is applied. It enables national jurisdiction to be asserted *vis-à-vis* perpetrators of particularly serious acts who are arrested in the national territory. This is so with acts of terrorism.¹⁹

The UNODC does not, however, explain what these international community interests comprise.

The common denominator of all of these views is to place stress on the absence of any explicit prescriptive connection, for example, based on the nationality of the accused or threats to vital interests, between the legislating State and an offence committed abroad: that is, at the time of the commission of the offence, no other internationally accepted ground of jurisdiction to prescribe is needed to link the legislating State to the accused. The prescriptive jurisdiction arising out of extradite or prosecute, it is assumed, must therefore be to protect international community values on a ground of universal jurisdiction.²⁰ This view is also based *a priori* on a fundamental assumption, namely that the protection of such values already exists as an indisputable customary rule in respect of piracy and war crimes, and has done so historically, which can simply be analogised with extradite or prosecute and expanded to include a wide range of other treaty crimes.²¹ This raises great uncertainty as to the most appropriate ground of

593; Lowe, V. & Staker, C., ‘Jurisdiction’, in Evans, M.D. (2010). ‘International Law’. Oxford: OUP, at p.328; Shaw, M.N. (2008). ‘International Law’. Cambridge: CUP, at pp.673-674.

¹⁷ UNODC, ‘Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments’, New York: U.N. (2006), paras.350-354, 360, 367.

¹⁸ *Ibid.*, para.347.

¹⁹ *Ibid.*, para.366. Cf. UNODC, ‘Universal Anti-Terrorism Conventions and Protocols’, New York: U.N. (2004).

²⁰ E.g., Institute, *supra* n 14, preambular para.1.

²¹ Layton, *supra* n 12, at p.223; Kreß, *supra* n 15, at p.566; Scharf, *supra* n 15, at pp.276-285; Third Restatement, *supra* n 14, para.404 & Reporters’ Note 1; *Arrest Warrant*, *supra* n 16, at pp.76, 78-79, 81 (J. Sep. Op. Judges Higgins *et al.*); U.N. Doc.A/65/181, *supra* n 12, para.27; Sixth Committee, U.N.

jurisdiction for combatting international terrorism, and the values or interests that States do, or should, protect. In order to illustrate the importance of these issues more forcefully, it is perhaps useful to refer to a few examples of eminent scholars in the field.

Scharf has asserted that, as regards universal jurisdiction under customary international law, '[f]or the past 500 years, States have exercised jurisdiction over piratical acts on the high seas'. In support, Scharf cited the Harvard Research and one other tentative, secondary source.²² Scharf proceeded to suggest that, in the aftermath of World War II, a customary rule of universal jurisdiction expanded to cover war crimes and crimes against humanity, and that in recent years a growing number of other offences 'have been made subject to universal jurisdiction through the negotiation of multinational conventions'.²³ However, Scharf provided no analysis of primary or secondary sources in support of the expansion of universal jurisdiction over piracy to include war crimes or treaty crimes, or the international community values protected. Similarly, O'Keefe has suggested that the adoption of universal jurisdiction in the 1949 Geneva Conventions 'helped to catalyse a re-conceptualization *already underway* of the international legal basis for national jurisdiction over war crimes more generally.'²⁴ The only way in which O'Keefe supported this assertion, by way of primary sources, was the citation of a single case arising out of State practice in the aftermath of World War II. As has already been explained elsewhere, O'Keefe misinterpreted this case as evidence of a customary rule of universal jurisdiction.²⁵ O'Keefe proceeded to state, without any further analysis, that the codification of 'mandatory' universal jurisdiction by the grave breaches provisions 'likely eased the passage of the long procession of international criminal conventions adopted since the beginning of the 1970s' obliging States parties to establish universal jurisdiction in their national laws.²⁶

Doc.A/C.6/64/SR.12 (20 October 2009), paras.10, 95; ALI, Restatement of Foreign Relations Law of the U.S. (Second), Washington, D.C. (1965), para.34, Comment (a)-(b) & Reporters' Note 2; Randall, K. (1987-1988). 'Universal Jurisdiction'. 66 *TexL.Rev.* 785.

²² *Supra* n 15, at p.276.

²³ *Ibid.*, at pp.278, 283.

²⁴ O'Keefe, *supra* n 15, at p.823 (*italics added*).

²⁵ Garrod, M. (2012). 'The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality'. 12 *ICLR* 93, at p.804.

²⁶ *Supra* n 15, at p.826.

The work of Kreß, to which reference has already been made in chapter one, is also particularly illustrative.²⁷ Kreß has asserted the ‘undeniably customary title to universal jurisdiction in the case of piracy’²⁸ and its expansion over war crimes,²⁹ despite not having undertaken any research or analysis of primary or secondary sources. Nonetheless, Kreß suggested that it is ‘evident’ that what has emerged from subsequent State practice is ‘the existence of true universal jurisdiction over all the crimes under international law’.³⁰ This leads Kreß to suggest that the extradite or prosecute principle, where it is used in treaties that proscribe conduct that is criminal under international law, is universal jurisdiction for the protection of international community values.³¹ Kreß leaves unexplained the values that are protected based on universal jurisdiction. This raises the small matter of other treaties that use extradite or prosecute, the vast majority of which do not deal with international crimes, as well as the difficulty of connecting the prescriptive jurisdiction arising out of these treaties with the protection of international community values. Kreß simply stated that:

[w]hether or not those *aut dedere aut judicare* regimes ‘protect fundamental values of the international community’ is open to question and precisely for this reason it is a matter of controversy whether or not they should be brought within the concept of universal jurisdiction.³²

It is not clear how the nature of a crime transforms the extradite or prosecute principle into a theory of universal jurisdiction in some treaties, while the use of the same principle in other treaties does not. A more persuasive explanation may be found in the fact that, as a matter of custom, international community values have traditionally not been protected under a theory of universal jurisdiction in respect of piracy and war crimes.³³ It is precisely for this reason that commentators, such as Kreß, are now faced with the dilemma of trying to distinguish between the nature and purpose of extradite or prosecute in treaties dealing with international crimes and the majority of other treaties making provision for the same obligation that have no relevance to international crimes, such as acts of terrorism.

²⁷ Kreß, *supra* n 15.

²⁸ *Ibid.*, at p.569.

²⁹ *Ibid.*, at p.566.

³⁰ *Ibid.*, at p.573.

³¹ *Ibid.*, at pp.566-568.

³² *Ibid.*, at pp.566-567.

³³ Chapter three; Garrod, *supra* n 25; Garrod, M. (2014). ‘Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law’. 25 *Diplomacy&Statecraft* 1.

It suffices to say that the interpretation of extradite or prosecute as a theory of universal jurisdiction has been accepted uncritically, and often exaggerated, by courts and commentators, which have persistently either relied on tentative, secondary material, or cited primary materials, wholly out of context.³⁴ It is open to question whether such an approach is sufficiently rigorous and provides for an accurate explanation of the law.³⁵ It also risks an oversimplification of the law. These issues are illustrated no better, perhaps, than the recent decision by the ICJ in the case of *Belgium v Senegal*, in which the ICJ pronounced, for the first time, on the obligation to extradite or prosecute and described the use of it in Article 5(2) of the 1984 U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT) as ‘universal jurisdiction’.³⁶ Since the present author has provided an in-depth analysis of the relationship between extradite or prosecute and universal jurisdiction elsewhere, including the judgment of the ICJ *inter alia*, the sections that follow are limited to a summary of the findings.³⁷ Extradite or prosecute in the CAT is modelled on the same principle used in approximately three-quarters of the multilateral treaties dealing with criminal matters that have been adopted since 1970, including counter-terrorism treaties.³⁸ It is therefore important to examine the way in which the ICJ described extradite or prosecute as universal jurisdiction in order to show, absent, as it is, of any reasoning, that it is simply a bald *ipse dixit* and the meaning given to ‘universal jurisdiction’ is thus open to question.³⁹

5.2.2. The *Habré* Case

The case concerned the institution of proceedings by Belgium at the ICJ against Senegal over a dispute concerning the latter’s compliance with its obligations arising under the CAT. More specifically, Belgium submitted, firstly, that Senegal had breached its

³⁴ E.g., references at footnotes 12 & 15.

³⁵ Yee, S. (2011). ‘Universal Jurisdiction: Concept, Logic, and Reality’. 10 *Chinese JIL* 503, para.14; Yee, S. (2013). ‘A Call for a More Rigorous Assessment of Universal Jurisdiction’. Annual Meeting of the American Society of International Law, April 2013).

³⁶ 1465 U.N.T.S. 85; Judgment, *supra* n 9.

³⁷ Garrod, M., ‘The Unreasoned Relationship between Extradite or Prosecute and Universal Jurisdiction in International Law in Light of the Judgment by the ICJ in *Belgium v Senegal*’ (under review by the Chinese ILJ).

³⁸ *Supra* n 10.

³⁹ Yee (2013), *supra* n 35, at p.245.

obligation under Article 5(2) of the CAT by failing to establish universal jurisdiction in its domestic law over the crimes under the instrument and, second, that Senegal was in breach of its obligations by failing to initiate criminal proceedings against *Habré*, or, failing that, by extraditing *Habré* ‘to Belgium without further ado’.⁴⁰

The ICJ, from the outset of its judgment, described the obligation to extradite or prosecute under the CAT as ‘universal jurisdiction’.⁴¹ In the words of the ICJ, ‘[t]he Convention against Torture thus brings together 150 States which have committed themselves to prosecuting suspects in particular on the basis of universal jurisdiction.’⁴²

The starting point for analysis is that Article 5 of the CAT does not expressly provide for a ground of ‘universal jurisdiction’.⁴³ This means that Article 5(2) has to be interpreted as universal jurisdiction. The way in which the ICJ approached this matter raises serious methodological concerns going to the heart of its reasoning. The ICJ described Article 5(2) as ‘universal jurisdiction’ in passing, as if such an interpretation was beyond question, and altogether avoided any analysis of extradite or prosecute, or the ground of universal jurisdiction in customary international law. On closer inspection, the ICJ appears to have impliedly followed the earlier decision of the U.N. Committee against Torture in the *Habré* case.⁴⁴ However, the Committee *inter alia* did not provide any reasoning in support of its description of extradite or prosecute in Article 5(2) of the CAT as ‘universal jurisdiction’ either.

As a general rule of treaty interpretation, the Vienna Convention on the Law of Treaties (the VCLT) provides, by virtue of Article 31, that a treaty shall be interpreted in accordance with ‘the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.⁴⁵ The ‘context’ of a treaty includes the instrument’s text and preamble.⁴⁶ The ICJ in the present case interpreted the ‘ordinary meaning’ of Article 5(2) as ‘universal jurisdiction’ according solely to the

⁴⁰ Judgment, *supra* n 9, paras.44, 71, 118.

⁴¹ *Ibid.*, paras.74 & 115.

⁴² *Ibid.*, para.75.

⁴³ *Arrest Warrant*, *supra* n 16, para.41 (J. Sep. Op. Judges Higgins *et al.*); Yee (2011), *supra* n 35, para.21; Yee (2013), *supra* n 35, at p.245.

⁴⁴ U.N. Committee against Torture, *Suleymane Guengueng et al. v Senegal*, Communication No.181/2001, decision of 17 May 2006, CAT/C/36/D/181/2001.

⁴⁵ Vienna, 23 May 1969, 1155 U.N.T.S. 331, Article 31(1).

⁴⁶ *Ibid.*, Article 31(2).

supposed ‘object and purpose’ of the CAT. The phrase ‘object and purpose’ is not defined by the VCLT and its meaning is vague and thus open to interpretation.⁴⁷ Nonetheless, in order to interpret the object and purpose of Article 5(2), one would reasonably expect the ICJ, which is at the heart of the international legal system, to have some regard to its ‘context’.⁴⁸ The ‘object and purpose’ of the CAT was inferred by the ICJ from a single, and somewhat ambiguous, preambular paragraph of the CAT, which merely provides that States parties desire ‘to make more effective the struggle against torture’.⁴⁹ According to the ICJ, this paragraph means ‘avoiding impunity’ in order to protect ‘shared values’, which can only be combated by an obligation to establish universal jurisdiction.⁵⁰ It may be the case that the ICJ placed more weight on this preambular paragraph than it is capable of bearing. In fact, the ordinary meaning given to Article 5(2) by the ICJ - by focusing on this preambular paragraph in isolation - is inconsistent with a basic textual analysis of the context of Article 5 as a whole and may even frustrate the textual situation.⁵¹ Article 5(2) makes clear that it cannot be considered in isolation to ‘the States mentioned in paragraph 1 of this article’. Yet the ICJ gave no consideration either to the meaning of this wording of the text of Article 5(2) or Article 5(1). This will be returned to below. The ICJ left unexplained how, either as a matter of custom or within the context of the CAT, the need to avoid impunity, an imprecise expression, specifically gives rise to universal jurisdiction, or the ‘shared values’ that States are supposed to protect by preventing impunity.

The VCLT provides for a supplementary means of interpretation, by having recourse to the preparatory work of the treaty, ‘in order to confirm the meaning resulting from the application of Article 31’.⁵² The only extent to which the ICJ was prepared to observe the *travaux préparatoires* of the CAT was to note, in passing, that Article 7(1) of the instrument is modelled on the 1970 Suppression of Unlawful Seizure of Aircraft.⁵³ This statement explains nothing as to the meaning of extradite or prosecute under Article 7(1) *inter alia* or, *a priori*, whether Article 5(2) of the CAT codifies a ground of

⁴⁷ Buffard, I. & Zemanek, K. (1998), ‘The “Object and Purpose” of a Treaty: An Enigma?’, 3 *AustriaRev.Int'l&Eur.L.* 311.

⁴⁸ *Supra* n 45, Article 31(3).

⁴⁹ *Supra* n 36, preambular para.6.

⁵⁰ Judgment, *supra* n 9, paras.50, 68, 74-75. See also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Belgium Memorial, vol.I (2010), at pp.45-46.

⁵¹ Garrod, *supra* n 37.

⁵² *Supra* n 45, Article 32.

⁵³ Judgment, *supra* n 9, para.90.

jurisdiction recognised by customary international law, no less an obligatory theory of ‘universal jurisdiction’.

It is not possible here to provide an in-depth analysis of the *travaux préparatoires* of the CAT.⁵⁴ It suffices to say that a close reading of the debates within the Working Group, which was established for the purpose of drawing up a draft convention, reveals that the nomenclature ‘principle of universality’ was used as nothing more than a way to describe the obligation to extradite or prosecute, a mechanism that was understood to correspond with provisions in a number of existing counter-terrorism conventions.⁵⁵ As pointed out by Burgers and Danelius, the respective representatives of the Netherlands and Sweden to the Human Rights Commission and, respectively, the Chairman of the Working Group and the draftsmen of the first draft of the convention, Article 5(2) was, ‘with some simplification, called ‘universal jurisdiction’’.⁵⁶ To accept at face value the reference made by the Working Group to ‘universal jurisdiction’, other than as a non-technical term used to describe extradite or prosecute, as have some,⁵⁷ risks attributing to Article 5(2) legal effects and consequences that were not debated or intended. This is indicated for three reasons.

First of all, the validity of universal jurisdiction under customary international law, as well as the implications raised by expanding this theory to include treaty-based crimes falling under the obligation to extradite or prosecute, was not examined by the Working Group. Second, it is unlikely that the Working Group intended to codify a theory of jurisdiction whose meaning and definition, then as now, are controversial and little understood.⁵⁸ Lastly, a number of States that participated in the drafting of Article 5(2) have subsequently confirmed that it was not intended to codify a ground of universal jurisdiction.⁵⁹ Notably, the only reason why extradite or prosecute appears to have been

⁵⁴ See Garrod, *supra* n 37; also Burgers, J.H. & Danelius, H. (1988). ‘The United Nations Convention against Torture. A Textbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’. The Netherlands: Martinus Nijhoff; Boulbesba, A. (1999). ‘The U.N. Convention on Torture and the Prospects for Enforcement’. The Hague: Martinus Nijhoff, chapter 4.

⁵⁵ Burgers & Danelius, *ibid.*, at p.35.

⁵⁶ *Ibid.*

⁵⁷ *Pinochet*, *supra* n 12, *ibid.* (Lord Browne-Wilkinson).

⁵⁸ U.N. Doc.A/65/181, *supra* n 12.

⁵⁹ Sixth Committee, U.K., Scope and application of the principle of universal jurisdiction, Note submitted to the Office of Legal Affairs pursuant to General Assembly resolution 65/33 of 6 December 2010 (2011); *ibid.*, Government of the People’s Republic of China, Information from and observations by China on the scope and application of the principle of universal jurisdiction, Note submitted to the Office

described as ‘universal jurisdiction’ is because of an over-simplistic analogy between the absence of an express prescriptive connection in Article 5(2) with an alleged offence and the presumed development of a theory of universal jurisdiction over piracy.⁶⁰

Nor was the ICJ in the present case prepared to consider the way in which Article 5(2) has subsequently been implemented and interpreted in State practice, in accordance with the VCLT, in order to deduce evidence of the emergence of a rule of universal jurisdiction.⁶¹ Whether the protection of international community values, or, to use the language of the ICJ, ‘shared values’, on the basis of universal jurisdiction has, in fact, developed as a customary rule through the implementation by States of treaties that utilise extradite or prosecute raises complex issues and would require nothing less than a rigorous, empirical assessment of State practice and *opinio juris*, which is beyond the scope of this chapter.⁶² It is worth noting, by way of an aside, that the idea that extradite or prosecute codifies a ground of universal jurisdiction has developed not out of State practice but, rather, out of comments and observations made by States. According to the ILC, the latter have the status merely ‘as secondary sources of information regarding State practice’.⁶³ Such observations and comments describing extradite or prosecute as a theory of ‘universal jurisdiction’ may not necessarily correspond with, and may even be contradicted by State practice. This is illustrated no clearer, for example, than the verbal claims by Spain, a State regarded as one of the ‘pioneers’ of universal jurisdiction, in its comments and observations submitted to the Sixth Committee of the U.N. General Assembly on the topic of universal jurisdiction.⁶⁴ In that connection, it is notable that the ICJ in the present case overlooked the fact that Belgium, one of only a handful of States to have previously established universal jurisdiction in its domestic law, amended its law in 2003, by which Belgium abolished universal jurisdiction and substantially restricted its scope over crimes committed abroad ‘only when the victim is, at the time of the events, Belgian, or having been staying effectively in Belgium for at least three

of Legal Affairs pursuant to General Assembly resolution 64/117 of 16 December 2009, at pp.3-4, 8-10 (2010).

⁶⁰ U.N. Doc.E/CN.4/1314 (1978), paras.15, 69; also *Pinochet*, *supra* n 12, at *ibid.* (Lord Millett).

⁶¹ *Supra* n 45, Article 31(3)(b).

⁶² Garrod, M., ‘The Development of Universal Jurisdiction: A Plea for a More Rigorous Approach to International Law Making’ (under preparation). See also Yee (2013), *supra* n 35, at p.242.

⁶³ U.N. Doc.A/CN.4/659 (2013), para.24.

⁶⁴ See Spain, *supra* n 12; Sixth Committee, ‘Scope and principle of international jurisdiction: information provided by the Kingdom of Spain, Note submitted to the Office of Legal Affairs pursuant to General Assembly resolution 67/98 of 14 December 2010 (29 April 2013), para.15.

years.⁶⁵ Belgium's submission in the present case that extradite or prosecute in the CAT requires States parties to establish universal jurisdiction is inconsistent with Belgium's own practice.⁶⁶

The debate on universal jurisdiction at the General Assembly and its Sixth Committee, which has been on-going since 2009, shows that there is great confusion and disagreement on the meaning of 'universal jurisdiction' and its relationship with extradite or prosecute, and that a considerable number of States have cautioned against confusing them.⁶⁷ Yee, having analysed the comments and observations during this debate, has found that extradite or prosecute has, through the use of loose language, inaccurately come to be described by many States as 'universal jurisdiction', which does not correspond with State and treaty practice.⁶⁸ The same point applies, *mutatis mutandis*, to the efforts made to codify extradite or prosecute by the ILC, which has not, after almost a decade of work, reached agreement on the relationship between universal jurisdiction and the distinct obligation to extradite or prosecute.⁶⁹ Thus, it may be open to question the extent to which the nomenclature of 'universal jurisdiction' used to describe extradite or prosecute can be relied upon in a meaningful way.

In sum, the reason why the ICJ gave no analysis to the meaning of extradite or prosecute in Article 5(2) may be because the ICJ found that it had 'no jurisdiction in this case' over it.⁷⁰ Yet, this raises the question whether the ICJ should have described extradite or prosecute as 'universal jurisdiction' at all.⁷¹ It also renders this aspect of the judgment to mere *obiter*. The judgment has, nonetheless, been welcomed in legal scholarship for 'clarifying the obligation to extradite or prosecute ... [by indicating] that the obligation is premised upon universal jurisdiction', and for reinforcing 'the principle that former heads of state are subject to universal jurisdiction for grave violations of

⁶⁵ Law of 5 August 2003, in Judgment, *supra* n 9, paras.5-8 (Diss. Op. Judge Xue); *ibid.*, para.40 (Sep. Op. Judge Abraham).

⁶⁶ See also Expert Report, *supra* n 12, at p.30.

⁶⁷ U.N. Doc.A/65/181, *supra* n 12, para.15; Sixth Committee, U.N. Doc.A/C.6/64/SR.12 (20 October 2009), paras.19, 48, 59, 66, 71, 82, 90, 95, 96; *ibid.*, U.N. Doc.A/C.6/65/SR.11 (13 October 2010), paras.10, 14, 17, 25, 27, 49; *ibid.*, U.N. Doc.A/C.6/66/SR.12 (12 October 2011), paras.4, 7, 18, 27, 34, 47, 59, 62, 72.

⁶⁸ Yee (2011), *supra* n 35.

⁶⁹ E.g., U.N. Doc.A/68/10, *supra* n 10, para.24; U.N. Doc.A/CN.4/612 (2009); U.N. Doc.A/CN.4/L.774 (2010), at pp.6-7; U.N. Doc.A/67/10 (2012), at pp.118-119; U.N. Doc.A/69/10 (2014), at pp.149-150.

⁷⁰ *Supra* n 9, para.74.

⁷¹ *Ibid.*

international law'.⁷² However, the loose reference by the ICJ to universal jurisdiction can hardly be regarded as a meaningful pronouncement on the extradite or prosecute principle itself or its relationship, if any at all, with universal jurisdiction.⁷³ On closer inspection, the extradite or prosecute principle may be capable of being interpreted in an alternative way, to which this chapter will now turn.

5.3. Extradite or Prosecute: An Alternative Interpretation?

Extradite or prosecute should not automatically be interpreted as codifying, or obliging States parties to establish in their national laws, a ground of universal jurisdiction.⁷⁴ Rather, the principle is, on closer inspection, equally capable of interpretation as a 'treaty-based' form of extraterritorial jurisdiction.⁷⁵ It has to be stressed, from the outset, that there is an important difference between such treaty-based jurisdiction and grounds of jurisdiction in general international law: the obligatory prescriptive jurisdiction arising out of the extradite or prosecute principle derives directly from treaty and *ipso facto* creates a prescriptive connection between States parties to the treaty concerned and the specified offences occurring abroad. It follows that the need for a legislating State, in implementing the extradite or prosecute principle, to justify the application of its national laws over the conduct of foreign nationals abroad - by evidencing, based on a particular ground of jurisdiction, a sufficiently close link between the impugned conduct and the interests of the legislating State - is not required as a matter of international law.⁷⁶ Thus, the absence of an explicit prescriptive connection does not, in and of itself, lead to a finding that such jurisdiction is based on a theory of 'universality'.

The question that one has to ask is the reason why States provide for such broad, obligatory prescriptive jurisdiction under the extradite or prosecute principle? The

⁷² Andenas, M. & Weatherall, T. (2013). 'International Court of Justice: Questions Relating to the Obligations to Extradite or Prosecute (Belgium v Senegal) Judgment of 20 July 2012'. 62 *ICLQ* 753, at pp.753, 768.

⁷³ See also Yee (2013), *supra* n 35, at p.245.

⁷⁴ Garrod, *supra* n 37; also *Arrest Warrant*, *supra* 16, para.41 (J. Sep. Op. Judges Higgins *et al.*); *Pinochet*, *supra* n 12, at pp.115-116 (Lord Goff); *ibid.*, at pp.187-188 (Lord Phillips); *U.S. v Yousef*, 327 F.3d56 (2nd Cir., 2003), at pp.94-96, 108-111; Yee, *ibid.*, at p.244; Yee (2011), *supra* n 35, paras.17-28; *R v Bow Street Magistrates' Court and others, ex parte Pinochet Ugarte* [1998] All ER (D)629(No 1), at p.14 (Lord Slynn); Institute of International Law (Rapporteur Lady Fox), 'The Fundamental Rights of the Person and the Immunity from Jurisdiction in International Law', 73 *Annuaire de l'Institut de droit international* 1 (2009), at pp.38-39.

⁷⁵ Garrod, *ibid.*; *Yousef*, *ibid.*; *Arrest Warrant*, *ibid.*, para.41 (J. Sep. Op. Judges Higgins *et al.*).

⁷⁶ See also China, *supra* n 59, para.6.

answer to this question, it would appear, is not solely to protect international community values, as would otherwise be required by universal jurisdiction. The reason for this finding is that none of the treaties utilising extradite or prosecute expressly provide for a ground of universal jurisdiction; moreover, it would be odd for such treaties to implicitly codify one particular ground of jurisdiction, as opposed to any other, or, for that matter, to require States parties to establish universal jurisdiction in their national laws, given the fundamental disagreement on its meaning. Nor do treaties make reference to the supposed international community values that States parties are obliged to protect. These treaties are often adopted in response to certain offences that implicate the sovereignty and certain other vital interests of States. In the case of the CAT, for example, it is reasonable to suppose from the operative provisions of the instrument that States are concerned with the protection of their own nationals from acts of torture by State officials and that such acts implicate the sovereignty, political independence and governmental functions of the parties concerned.⁷⁷

A more persuasive explanation is to be found from a basic textual analysis of the extradite or prosecute principle used in three-quarters of the multilateral treaties dealing with criminal matters that have been adopted since 1970, including the CAT, which would appear to create a prescriptive connection, albeit one deriving from treaty, between States parties and treaty offences that occur abroad in two important ways.⁷⁸ Given that the focus of the present study is on international terrorism, these links are illustrated here by considering extradite or prosecute used in counter-terrorism treaties and, by way of example, the 1997 International Convention for the Suppression of Terrorist Bombings (the Bombings Convention).⁷⁹

The Bombings Convention provides, by virtue of Article 6(4), that '[e]ach State Party shall ... take such measures as may be necessary to establish its jurisdiction over such offences [referred to in Article 2] in cases where the alleged offender is present in its territory *and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.*'⁸⁰ The obligation to

⁷⁷ Garrod, *supra* n 37.

⁷⁸ See also Yee (2011), *supra* n 35, para.8.

⁷⁹ 2149 U.N.T.S. 256.

⁸⁰ Italics added.

extradite or prosecute thus comprises two mutually distinct, but intertwined, aspects: jurisdiction to prescribe and jurisdiction to enforce.

In respect of prescriptive jurisdiction, the wording of Article 6(4) makes it sufficiently clear that the scope of jurisdiction arising out of the extradite or prosecute principle is, by definition, limited to treaty offences that have a specified prescriptive link with one or more of the States parties ‘which have established their jurisdiction in accordance with paragraph 1 or 2’ (paragraph 1 and 2 States). It is evident from the text of Article 6(4) that the jurisdiction of the State in whose territory the accused is present, or the ‘custodial State’, as it will be referred to in the present chapter, has to be read in conjunction with the jurisdiction of paragraph 1 and 2 States. These latter States are either required or permitted to provide for prescriptive jurisdiction under certain specified circumstances because they have links with the proscribed conduct. Article 6(1) provides that States parties ‘shall’ establish their jurisdiction, for example, where an offence is committed in the territory of the legislating State or by one of its nationals.⁸¹ Article 6(2) sets out more specific circumstances in which States parties ‘may’ establish their jurisdiction, for example, where an offence is committed against a national of the legislating State, or against a State or government facility of that State abroad, or if the offence is committed in order to compel that State to do or abstain from doing any act.⁸² As will be shown below, jurisdiction under these latter circumstances is to protect certain shared vital State interests.

This alone would indicate that the jurisdiction of the custodial State under Article 6(4) is not ‘universal’; and to suggest that this jurisdiction is based on no prescriptive connection whatsoever with any State, other than the mere ‘presence’ of the accused in the territory of the custodial State, does not sit neatly with a reading of Article 6 as a whole. It is worth recalling that the ICJ in the *Habré* case considered the jurisdiction of the custodial State under Article 5(2) of the CAT in isolation from the jurisdiction of other parties under Article 5(1) of the instrument. This led the ICJ to suggest, somewhat artificially, that the custodial State’s jurisdiction is to protect exclusively international community values.⁸³ It would have made little sense for delegations during the drafting

⁸¹ *Supra* n 79, Article 6(1)(a) & (c).

⁸² *Ibid.*, Article 6(2)(a), (b) & (d).

⁸³ Garrod, *supra* n 37.

of the Bombings Convention to negotiate and set out in Article 6(1) and (2) relatively narrow circumstances in which jurisdiction may be established, each of which requires a prescriptive link between an offence and the legislating State, only for Article 6(4) - a subsidiary paragraph - to create an all-encompassing, obligatory ground of universal jurisdiction. Article 6(1) and (2) would, moreover, be rendered superfluous.

The reason why the custodial State, as a party to the Bombings Convention, is obliged to provide for prescriptive jurisdiction over treaty offences committed abroad having no connection to it, that is, offences that implicate the interests of other States parties, is in order to give proper effect to the obligation of extradite or prosecute. This obligation would not be able to function as a legal mechanism for facilitating inter-State cooperation and providing mutually beneficial protection of certain rights and interests shared by parties if the prescriptive jurisdiction under this principle was expressly limited to circumstances where there is a connection between an offence and specific interests of the legislating State. The ever-present possibility that extradition may not be forthcoming is precisely the reason for the mandatory treaty-based prescriptive jurisdiction arising out of the extradite or prosecute principle.⁸⁴ Interestingly, the same interpretation of extradite or prosecute was made by De Visscher during the effort made by the League of Nations to codify extraterritorial jurisdiction and extradition. De Visscher suggested that ‘it might be desirable to stipulate that a State which refuses to surrender its nationals in respect of offences committed by them abroad of the kind mentioned in the extradition treaties should itself be required to put them on trial’.⁸⁵ This point is returned to below.

There is, however, a further reason why the prescriptive jurisdiction of the custodial State under Article 6(4) is not universal. The wording of Article 6(4) is sufficiently broad to enable the custodial State to protect certain of its own vital interests, or even the vital interests of one or more of its allies, in situations where either the alleged offence or the vital interests implicated cannot be evidenced to fall within one of the more narrow circumstances specified by Article 6(2). This prescriptive jurisdiction, which impliedly creates a link with the alleged offence, may be enforced by the custodial State as soon as the accused is present on its territory and by failing to

⁸⁴ *Yousef*, *supra* n 74, at pp.94-96, 108-111.

⁸⁵ *Infra* n 111, at p.258.

extradite the accused to another party.⁸⁶ However, the custodial State does not have to evidence an actual prescriptive connection with the alleged offence. There may, of course, be other potential reasons why the custodial State fails to extradite the accused to a paragraph 1 or 2 State. It matters not, however, what these reasons may be. All that matters, from a legal perspective, is that the custodial State initiates criminal proceedings, failing extradition to a paragraph 1 or 2 State. The wording of Article 6(4) does not prevent such an interpretation of prescriptive jurisdiction.

The extradite or prosecute principle not only gives rise to broad, obligatory prescriptive jurisdiction; it also gives rise to an obligation to extradite or prosecute. While prescriptive jurisdiction is extraterritorial, Article 6(4) makes clear that such jurisdiction must be ‘established’, or, to put it a different way, enforced, where the accused is present in the legislating State’s territory and it does not, for whatever reason, extradite that person to any paragraph 1 or 2 State. In situations where the custodial State fails to extradite the accused to a paragraph 1 or 2 State, whose disputed acts have no link at all to the custodial State, the prescriptive jurisdiction of the custodial State does not transform into a ground of universality, that is, in order to protect exclusively international community values. Rather, the wording of Article 6 implies that paragraph 1 and 2 States have primary jurisdiction and Article 6(4) presupposes that, had the accused been extradited by the custodial State, one of the paragraph 1 or 2 States, each of whom has a specified prescriptive link with the accused or the offence, would upon obtaining custody be able to enforce their prescriptive jurisdiction.

A perhaps more accurate way of interpreting the extradite or prosecute principle is, first and foremost, a means for a paragraph 1 or 2 State to obtain the custody of an accused and to establish its jurisdiction. Accordingly, the custodial State, by failing to extradite the accused to a paragraph 1 or 2 State, implicitly, and reasoning *a fortiori*, has an obligation to establish its jurisdiction on their behalf, in order to prevent the latter from becoming an ‘injured State’ within the meaning of Article 42 of the ILC’s Draft Articles on State Responsibility. In these circumstances, the custodial State is obliged to provide for treaty-based jurisdiction in order to implement the extradite or prosecute obligation

⁸⁶ E.g., *Yousef*, *supra* n 74; *Yunis*, *supra* n 12, at p.1092; *R v Zardad*, High Court of 19 July 2005 (no written judgment is available); *S v Okah* (SS94/2011) [2013] ZAGPJHC 6 (21 January 2013); submission of Libya before the ICJ in the Lockerbie incident, *infra* n 90.

and, in turn, protect the interests (including certain of the vital interests) of a paragraph 1 or 2 State if extradition fails. The enforcement of this prescriptive jurisdiction by States parties on each other's behalf, where extradition is not forthcoming, is precisely the reason why the obligation to extradite or prosecute is triggered only upon the accused's presence in the territory of a State party.

The above interpretation of prescriptive jurisdiction arising out of extradite or prosecute is consistent with the facts of the *Habré* case. Belgium's principal argument was that it had the right to assert jurisdiction over alleged acts of torture committed by *Habré* against Belgian nationals, by virtue of Article 5(1)(c) of the CAT, and that the refusal by Senegal to prosecute *Habré* under Article 5(2) of the CAT, failing extradition to Belgium, meant that Belgium was an 'injured State'. It follows, according to Belgium, that Belgium had a 'special interest' in the *Habré* case.⁸⁷ It is also the reason why Belgium - the first State to seek to enforce its rights under Article 5(2) of the CAT before the ICJ - as opposed to any other State, instituted proceedings against Senegal for the latter's failure to prosecute *Habré* for alleged crimes committed against Belgian nationals, failing extradition to Belgium.⁸⁸ It is worth noting that the ICJ in that case left unexplained the reason why it did not give any consideration to Belgium's principal claim. The present interpretation of extradite or prosecute is also supported by the way in which extradite or prosecute has been implemented in domestic laws⁸⁹ and exercised in the practice of States.⁹⁰ The present discussion is limited to the principle of extradite or prosecute as formulated in counter-terrorism treaties and no comment is made on the formulation of this principle in other treaties, such as 1949 Geneva Conventions.⁹¹ That said, it is worth noting, by way of aside, that the grave breaches provisions of the Geneva Conventions are often described in legal scholarship and by many States as the

⁸⁷ *Supra* n 9, para.65; Belgium Memorial, *supra* n 50, at pp.11, 44, 56-7, 78, 79, 82.

⁸⁸ Judgment, *ibid.*, paras.21-23 (Diss. Op. Judge ad hoc Sur); Belgium Memorial, *ibid.*; Application Instituting Proceedings, ICJ 2009, General List No. 144, at pp.3, 11, 15; oral proceedings, CR 2012/2 (12 March 2012), paras.3-4, 12, 13; oral proceedings, CR 2012/6 (19 March 2012), paras.24, 50, 51, 53; oral proceedings, CR 2012/3 (13 March 2012), at pp. 28, 44, 47.

⁸⁹ National Laws and Regulations on the Prevention and Suppression of International Terrorism: Part I, U.N. Legislative Series (U.N. publication, No.E/F.02.V.7), p.115; also China, *supra* n 59, para.6; Sixth Committee, U.N. Doc.A/C.6/64/SR.13 (24 November 2009).

⁹⁰ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v U.S.)*, Provisional Measures, I.C.J. Reports 1992, p.114, para.2 (J. Dec. Judges Evensen, Tarassov, Guillaume and Aguilar); also *Pinochet (No 1)*, *supra* n 74, at p.5 (Lord Slynn); *Zardad*, *supra* n 86.

⁹¹ Geneva Conventions of 1949 (Articles 49(I); 50(II); 129(III); 146(IV)).

first modern codification of universal jurisdiction.⁹² However, as has been shown by the present author elsewhere,⁹³ this is not supported by a careful reading of primary sources, most notably the record of the Diplomatic Conference and the authoritative commentary of Pictet.⁹⁴

5.3.1. The Rationales of Universal Jurisdiction and Extradite or Prosecute

Conceptually, the idea that extradite or prosecute impliedly codifies universal jurisdiction confuses ‘international community values’ and ‘shared vital State interests’. Extradite or prosecute and universal jurisdiction are both instrumental in combating impunity of perpetrators of serious crimes. However, they are conceptually distinct and have different aims - and are capable of protecting different values and interests - in preventing impunity.

It will be recalled from chapter one that it is widely suggested by States and courts, and in legal scholarship, that universal jurisdiction is permitted as a matter of custom. The reason why this is so is because such jurisdiction transcends the interests of any State and every State is presumed to have an interest in preventing the impunity of perpetrators of certain ‘heinous’ offences in order to protect ‘international community values’.⁹⁵ This raises two issues of great importance.

⁹² U.N. Doc.A.CN.4/630, *supra* n 8, para.44; O’Keefe, *supra* n 15, at pp.819, 828; *Prosecutor v Tadić*, Case No. IT-94-I-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber) (2 October 1995), paras.79-80; Boelaert-Suominen, S. (2000). ‘Grave Breaches, Universal Jurisdiction and International Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for all Armed Conflicts?’. 5 *J. Conflict Security Law* 63; Henckaerts, J. & Doswald-Beck, L. (eds.) (2005). ‘Customary International Humanitarian Law’. Cambridge: CUP, at p.604; Van Elst, R. (2000). ‘Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions’. 13 *LJIL* 815, at pp.819-822.

⁹³ Garrod, *supra* n 25, at pp.810-812; Garrod, M., ‘A Re-Evaluation of the Codification of Universal Jurisdiction by the 1949 Geneva Conventions’ (under preparation); also, Yee (2011), *supra* n 35, paras.19-21; Röling, B.V.A., ‘Aspects of the Criminal Responsibility for Violations of the Laws of War’, in Cassese, A. (ed.) (1979). ‘The New Humanitarian Law of Armed Conflict’. Naples: Editoriale Scientifica, at p.202.

⁹⁴ Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, Vol.II, Section B; Pictet, J.S. (1952). ‘Commentary, I, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field’. Geneva: ICRC.

⁹⁵ *Arrest Warrant*, *supra* n 16, at pp.76, 79, 81-82 (J. Sep. Op. Judges Higgins *et al.*); *ibid.*, at pp.141, 167 (Diss. Op. Judge van den Wyngaert); *ibid.*, at p.98 (Diss. Op. Judge Al-Khasawneh); Judgment, *supra* n 9, paras.123, 177 (Sep. Op. Judge Trindade); *Eichmann v Attorney-General* 36 ILR 277 (Supreme Court), at p.300; U.N. Doc.A/65/181 (2010), *supra* n 12, paras.7, 9-11, 27; Sixth Committee, ‘Observations by Belgium on the scope and application of the principle of universal jurisdiction’, para.4; *ibid.*, U.N. Doc.A/C.6/65/SR.11 (13 October 2010); Institute, *supra* n 14; Abi-Saab, *supra* n 16, at pp.599-600; Cassese, *supra* n 16, at p.591; Kreß, *supra* n 15, at p.567; O’Keefe, *supra* n 15, at p.824; Shaw, *supra* n 16, at p.668; Macedo, S. (ed.) (2001). ‘The Princeton Principles on Universal Jurisdiction’. Princeton: New Jersey, at pp.23-24, 45; Simma, B. & Müller, A.T., ‘Exercise and Limits of Jurisdiction’, in

The first of these is that, as has already been explained in chapters two and three, a customary rule of protective jurisdiction has developed over piracy for the protection of certain shared vital State interests. The no nexus requirement over piracy on the high seas has, since the Dissenting Opinion of Judge Moore in the *Lotus* case and the proposal *lex ferenda* by the Harvard Research, come to be inaccurately referred to as ‘universal jurisdiction’. Secondly, if as claimed by some States and judicial opinions, and in legal scholarship, that international law permits States to exercise universal jurisdiction over certain crimes because they are ‘heinous’, one may immediately question the reason why the ‘heinous’ nature of a crime gives rise to universal jurisdiction. The heinous rationale has its origins, and is dependent for its legitimacy, based on the assumption that it first developed in the case of piracy. The present author has shown elsewhere, however, that the condemnation of piracy as ‘heinous’ has nothing to do with universal jurisdiction or the protection of international community values.⁹⁶ Rather, piracy was sometimes labelled as heinous because of the threat posed to the vital colonial trade and economic interests of the prosecuting State. The development of a customary rule of protective jurisdiction over piracy applies *mutatis mutandis* to war crimes in the aftermath of World War II. If States did protect international community values in the suppression of piracy and war crimes then this was, at best, incidental. In any case, there is no evidence, based on State practice, to say with certainty what such values may have comprised. It has to be borne in mind that the theory of universal jurisdiction in respect of piracy and war crimes has developed out of a collective belief *ex post facto* and dramatically diverges from history. This would explain the reason why such values are usually left insufficiently explained or unsubstantiated by courts and in legal scholarship.⁹⁷ It would also explain why the debate on universal jurisdiction at the U.N. General Assembly, which has been on-going since 2009, shows that there is considerable confusion not only of the way in which

Crawford, J. & Koskeniemi, M. (2012). ‘The Cambridge Companion to International Law’. Cambridge: CUP, at p.144; Villalpando, S. (2010). ‘The Legal Dimensions of the International Community’. 21 *EJIL* 387, at p.406.

⁹⁶ Garrod (2014), *supra* n 33, at pp.199-200.

⁹⁷ *Arrest Warrant*, *supra* n 16, at pp.43-44 (Sep. Op. Judge Guillaume); *ibid.*, at (J. Sep. Op. Judges Higgins *et al.*); Judgment, *supra* n 9; Special Tribunal for Lebanon, *supra* n 12, paras.29, 86 & n 134, 91, 118; *Yunis*, *supra* n 12, at p.1091; UNODC, *supra* n 19; Expert Report, *supra* n 12, at p.42; Institute, *supra* n 14, preambular paras.1-2; Kreß, *supra* n 15; Macedo, *supra* n 95, at pp.23-24; O’Keefe, *supra* n 15; Randall, *supra* n 21; Second Restatement, *supra* n 21; Third Restatement, *supra* n 14.

universal jurisdiction has developed in custom but also the international community values that have been included under its ambit.

In sum, the type of international community values that may now be protected by universal jurisdiction, as a matter of custom, is unclear and needs to be worked out and agreed by States. The preamble to the Rome Statute of the International Criminal Court provides a useful illustration that one such international community value is the prevention of the impunity of perpetrators of ‘the most serious crimes of concern to the international community as a whole’.⁹⁸ However, the operative provisions of the same instrument make equally clear that the protection of this value does not fall under the ambit of universal jurisdiction. The same point applies, *mutatis mutandis*, to the Genocide Convention.⁹⁹

In the light of the foregoing observations, it is apparent, in the first place, that it is inappropriate to analogise the no nexus requirement over piracy with the treaty obligation to extradite or prosecute and treat them as one and the same. In any case, the reason why States use the obligation to extradite or prosecute in counter-terrorism treaties, in order to prevent impunity of serious crimes, is fundamentally different to the theory of universal jurisdiction: treaty offences implicate and have a connection with certain vital State interests shared by the parties. It is the threat to such interests by international terrorism that States adopt these treaties in the first place. Thus, States provide for broad prescriptive jurisdiction as a mutually beneficial means to protect certain of their own vital interests, or oblige other parties to protect such interests on their behalf in case extradition is not forthcoming. These shared vital State interests are not defined by treaties as such but, as is made sufficiently clear from their operative provisions, they include, for example, the State’s sovereignty, political independence, government facilities (including persons and premises entitled to special protection by international law) and nationals from certain acts of terrorism. These shared vital State interests are discussed below.

⁹⁸ Rome, 17 July 1998, 2187 U.N.T.S. 3, preambular paras.4-6; also A/RES/67/1 (24 September 2012).

⁹⁹ Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, 78 U.N.T.S. 277, Article 6.

There is no evidence to suggest, either by virtue of the operative provisions of counter-terrorism treaties or empirically based on the way in which they have been implemented in national laws that they have a connection with the protection of international community values, no less the exclusive protection of such values. Some counter-terrorism treaties refer in their preambular paragraphs to ‘the occurrence of such acts is a matter of grave concern to the international community as a whole’.¹⁰⁰ However, it would be a great leap to rely on such general statements in order to suggest that extradite or prosecute contained in the operative provisions in these treaties protects exclusively international community values or that such values are protected based on universal jurisdiction, as did the ICJ in the *Habré* case.¹⁰¹ Likewise, acts of terrorism committed against the State’s nationals and diplomatic personnel and premises, offences which are criminalised by counter-terrorism treaties, are ‘condemned in the strongest terms’ and described as ‘heinous’ by the Security Council.¹⁰² However, neither the Security Council nor the States whose interests are implicated have suggested that such crimes are subject to universal jurisdiction for the protection of international community values.

This is not to suggest, however, that the obligation to extradite or prosecute may not also involve or contribute in some way, perhaps indirectly or incidentally, to the protection of international community values by combatting the impunity of perpetrators of serious crimes. It may be the case that the conclusion of a treaty that proscribes certain conduct and uses the obligation to extradite or prosecute *ipso facto* gives effect to the protection of such values. That said, it is not clear, other than the prevention of such impunity, what these values are agreed to comprise, or, for that matter, whether they correspond with those values protected by universal jurisdiction. It would, in any case, go too far to suggest that the protection of international community values by extradite or prosecute transforms the prescriptive jurisdiction arising from it into a ground of universal jurisdiction. These issues are underscored by a close reading of the debate on universal jurisdiction at the General Assembly and the work by the ILC to codify extradite or prosecute, which exhibit fundamentally divergent views.

¹⁰⁰ E.g., 1973 Protection and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 U.N.T.S. 167, preambular para.3 (the Internationally Protected Persons Convention).

¹⁰¹ Garrod, *supra* n 37.

¹⁰² E.g., Press Statement, Attacks against U.S. Diplomatic Personnel, SC/10761-AFR/2440 (12 September 2012).

The view that extradite or prosecute and universal jurisdiction are alike, or one and the same, and that the former gives effect to the protection of an international community value - the prevention of impunity - has been expressed by a number of States.¹⁰³ On the other hand, a considerable number of States have cautioned that extradite or prosecute plays a crucial role in the prevention of impunity but that it should not be confused with universal jurisdiction.¹⁰⁴ This disagreement among States is reflected in the work of the ILC. The ILC Rapporteur, having studied the inclusion of extradite or prosecute in counter-terrorism treaties since 1970, suggested in his preliminary remarks that there has been created a ‘principle of universality of suppression of appropriate terrorist acts’.¹⁰⁵ He proceeded to caution that:

The principle of universality of suppression should not be identified, however, with the principle of universality of jurisdiction [...] The universality of suppression in this context means that, as a result of application of the obligation to extradite or prosecute between States concerned, there is no place where an offender could avoid criminal responsibility and could find so-called “safe haven”.¹⁰⁶

More recently, the ILC’s Working Group on the topic, following the decision of the ICJ in the *Habré* case, has suggested that the establishment of jurisdiction in the implementation of extradite or prosecute:

when the crime was allegedly committed abroad with no nexus to the forum State [...] would necessarily reflect an exercise of universal jurisdiction, which is “the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events” [...] However, the obligation to extradite or prosecute can also reflect an exercise of jurisdiction under other bases. Thus, if a State can exercise jurisdiction on another basis, universal jurisdiction may not necessarily be invoked in the fulfilment of the obligation to extradite or prosecute.¹⁰⁷

This statement reveals the extent of disagreement among the Working Group’s members of how to interpret extradite or prosecute and the protection of shared vital State interests and international community values. The suggestion that the custodial State’s jurisdiction would ‘reflect an exercise of universal jurisdiction’ *inter alia*

¹⁰³ *Supra* n 12.

¹⁰⁴ *Supra* n 67.

¹⁰⁵ U.N. Doc.A/59/10 (2004), Annex, para.9.

¹⁰⁶ *Ibid.*

¹⁰⁷ U.N. Doc.A/68/10, *supra* n 10, para.24.

indicates that the Working Group is not unanimous that it is universal jurisdiction. This is confirmed by the fact that the Working Group quoted the Joint Separate Opinion of Judges Higgins *et al.* in the *Arrest Warrant*, namely that the custodial State has an obligation to ‘establish a territorial jurisdiction over persons for extraterritorial events’.¹⁰⁸ The judges in that case, having studied ‘the provisions of certain important treaties of the last 30 years’ that have included extradite or prosecute, the adoption of which, observed the judges, has been asserted in legal scholarship to ‘evidence universality as a ground for the exercise of jurisdiction recognised in international law’, concluded that they do not provide for universal jurisdiction.¹⁰⁹ The suggestion by the Working Group that the custodial State’s jurisdiction ‘can also reflect an exercise of jurisdiction under other bases’ does not sit comfortably with the assumption that extradite or prosecute *ipso facto* codifies a ground of universal jurisdiction. It is to the meaning of shared vital State interests that the chapter will now turn.

5.4. Approaches to Defining Protective Jurisdiction

One of two approaches has been used in previous efforts to define protective jurisdiction. It is useful first to explain which of these approaches is adopted by the present chapter, before proceeding to enumerate some of the vital interests that have been included under the ambit of protective jurisdiction *lex lata*. The first approach is to define protective jurisdiction based on vital interests. This approach has historical precedents. It will be recalled from chapter three that the Institute of International Law defined protective jurisdiction based on crimes committed against the State’s ‘security’ and ‘credit’.¹¹⁰ Brierly, acting as Rapporteur for the League of Nations, did not give any consideration to vital interests, other than the State’s ‘security’. Brierly rejected this approach to defining jurisdiction as every State is ‘regarded as the judge of what endangers its own security.’¹¹¹ Brierly’s point remains valid. As put by Jennings, a State may have ‘peculiar and even outrageous notions of what affects its security or vital interests’.¹¹² De Visscher, on the other hand, who assisted Brierly, accepted the approach of defining protective jurisdiction based on vital interests and went further

¹⁰⁸ *Arrest Warrant*, *supra* n 16, para.42 (J. Sep. Op. Judges Higgins *et al.*).

¹⁰⁹ *Ibid.*, paras.25, 26, 41.

¹¹⁰ Cited in Scott, J.B. (1932). ‘The Two Institutes of International Law’. 26 *AJIL* 87, at p.89.

¹¹¹ Brierly, J.L. & De Visscher, C., Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, ‘Jurisdiction over Extraterritorial Crime’. 20 *AJIL (Spec. Supp.)*(1926) 252, at pp.255-256.

¹¹² Jennings, R.Y. (1957). ‘Extraterritorial Jurisdiction and the United States Antitrust Laws’. 33 *BYIL* 146, at p.155.

than did Brierly by stating that, in addition to ‘security’, protective jurisdiction also covers offences committed against the State’s ‘credit’, ‘institutions’ and ‘essential interests’. However, De Visccher did not examine what these ‘essential interests’ comprised.¹¹³

The Harvard Research, which defined the ‘protective principle’ in a Draft Convention, suggested that this ground of jurisdiction is applicable over ‘any crime’ committed against the State’s ‘fundamental interests’, namely its ‘security, territorial integrity or political independence’, as well as its currency, seals and public documents.¹¹⁴ This category of vital interests has since been described as ‘unobjectionable’.¹¹⁵ That said, it has to be borne in mind that the Harvard Research appears to have defined the protective principle *stricto sensu*, not only for the purpose of proposing a Draft Convention, which the Harvard Research hoped would merit the attention of the League, but also due to the perceived objections to protective jurisdiction by the U.S. and Britain. In any case, the definition of protective jurisdiction by the Harvard Research may be largely out of date.

The ALI has adopted a similar approach to that of the Harvard Research in the Restatement (Third) and defined vital interests in narrow terms, namely the State’s ‘security’ and ‘governmental functions’.¹¹⁶ The ALI appears to have attempted to counter the concern raised by Brierly and Jennings, as referred to above, by stating that the ‘class of offences’ covered by protective jurisdiction is ‘limited’ and are ‘generally recognised as crimes by developed legal systems’.¹¹⁷ The ALI is intended to be based on U.S. practice and does not reflect customary international law.¹¹⁸ Nevertheless, the approach by the ALI raises two important issues. First of all, the ALI, it will be recalled, referred to protective jurisdiction as an ‘unruly horse’ that could be used by States ‘possibly objectionable to United States’ interests’.¹¹⁹ It is therefore reasonable to suppose that the ALI deliberately defined the category of vital interests falling under the principle in overly-narrow terms. One of the problems with defining the category of

¹¹³ *Supra* n 111, at pp.258-259.

¹¹⁴ Harvard Research, *supra* n 4, Articles 7 and 8 respectively.

¹¹⁵ Akehurst, M. (1972-1973). ‘Jurisdiction in International Law’. 46 *BYIL* 145, at p.158.

¹¹⁶ Third Restatement, *supra* n 14, para.402, Comment f.

¹¹⁷ *Ibid.*

¹¹⁸ Chapter four.

¹¹⁹ Jennings, R.Y. (1962). ‘The Limits of State Jurisdiction’. 32 *NoTIR* 209, at p.223.

vital interests narrowly is that all possible crimes have to fall, however unpersuasively, within the seemingly all-encompassing terms of ‘security’ and ‘governmental functions’.¹²⁰ There has certainly been an overreliance by U.S. courts on the Restatement, as the only source to have codified protective jurisdiction, in this regard. On the other hand, the ALI left open-ended the crimes which are capable of being covered by protective jurisdiction, as long as they are ‘generally recognised as crimes by developed legal systems’. However, since publication of the Restatement in 1965, the U.S. Government and domestic courts have given a broad range of national laws extraterritorial application under the protective principle, regardless of their recognition in the national laws of other States.¹²¹

The alternative approach to defining protective jurisdiction is, instead, to objectively categorise a list of crimes covered by this jurisdiction.¹²² This approach was observed by Brierly in his capacity as Rapporteur. Brierly suggested that ‘States, instead of reserving to themselves the right to decide for the purposes of their non-territorial jurisdiction what acts endanger their security, would accept an agreed and uniform list in which such acts would be specified.’¹²³ The Harvard Research also discussed the idea of defining protective jurisdiction according to the specific acts which may be denounced as criminal.¹²⁴ Lauterpacht has suggested that protective jurisdiction should cover ‘generally recognised’ crimes,¹²⁵ while Mann has suggested that it should cover crimes as recognised in the ‘general practice of civilised states’,¹²⁶ while Jennings has suggested that the principle should cover crimes committed against the ‘sovereign rights of a state as are universally admitted’.¹²⁷ The problem with this approach is that it is not practicable or possible to define uniformly and exhaustively all of the crimes falling under the ambit of protective jurisdiction. As has already been explained elsewhere by Cameron, it is difficult to identify sufficiently uniform State practice in respect to which protective principle jurisdiction may extend due to the ‘differences in the types of offence which different states regard as capable of being encompassed by the

¹²⁰ *U.S. v Reumayr*, 530 F.Supp.2d1210, at p.1222.

¹²¹ E.g., *Reumayr*, *ibid.*; *U.S. v Gonzales* 776 F.2d931 (11th Cir., 1985).

¹²² Ryngaert, C. (2008). ‘Jurisdiction in International Law’. Oxford: OUP, at p.98.

¹²³ Brierly, *supra* n 111, at p.257.

¹²⁴ Harvard Research, *supra* 4, at p.556.

¹²⁵ Oppenheim, L., ‘International Law’ (vol.I, ed. by Lauterpacht, H. (London: Longmans, 1955)), at p.333.

¹²⁶ Mann, F.A. (1964). ‘The Definition of Jurisdiction in International Law’. 1 *Recueil des Cours*, 1, at p.80.

¹²⁷ Jennings, *supra* n 119, at p.216.

principle.’¹²⁸ This is all the more apparent in the context of international terrorism, in particular the widely diverging national definitions of ‘terrorism’.¹²⁹ Defining jurisdiction in terms of an exhaustive list of crimes, and getting States to agree to such a list, is likely to result in a principle which is overly-narrow and inflexible. This approach may be inappropriate for responding to the complex and evolving nature of the threat of international terrorism. It is probably for these reasons that this approach was not adopted by the Institute of International Law, the Harvard Research or the ALI.

The approach adopted by the present chapter is therefore to define protective jurisdiction based on vital interests, by trying to infer such interests from the empirical analysis of State practice in chapter four. The need to examine such interests in the codification of protective jurisdiction has also been recognised more recently by the ILC.¹³⁰ A similar approach to defining protective jurisdiction has been proposed by Cameron. After an extensive study of the principle, Cameron concluded that a more effective approach *inter alia* is to focus on the ‘generally recognised values underlying certain categories of offences’, although Cameron did not go so far as to examine or explain what these ‘values’ may comprise.¹³¹ The reason for this is that Cameron adopted the idea of ‘generally recognised values’ in defining protective jurisdiction based on a proposal made by the Committee of Experts on Extraterritorial Jurisdiction, discussed above, which did not explain what these values are either.¹³² The reason for this proposal appears to have been twofold.

The first of these is that there is no agreement, and therefore no certainty, as to which interests are at present regarded as ‘vital’.¹³³ Second, it is not clear, *a priori*, how interests should qualify as ‘vital’. In its examination of vital interests, the Committee of Experts stated that ‘[o]ne may wonder whether it really is possible and even wise to try and enumerate such interests’.¹³⁴ True to its word, the Committee of Experts did not attempt to define a category of vital interests that is capable of falling under the

¹²⁸ Cameron, I. (1994). ‘The Protective Principle of International Criminal Jurisdiction’. Aldershot: Dartmouth, at p.49; also Akande, D., “‘The Protective Principle’”; “The Active Nationality Principle”; “The Passive Personality Principle”; “The Territoriality Principle”, in Cassese *et al.*, *supra* n 15, at p.474.

¹²⁹ Chapter four.

¹³⁰ Chapter six.

¹³¹ Cameron, *supra* n 128, at pp.300-303.

¹³² *Supra* n 5.

¹³³ *Ibid.*, at p.467; also Reydams, L. (2003). ‘Universal Jurisdiction: International and Municipal Perspectives’. Oxford: OUP, at pp.22-23.

¹³⁴ *Ibid.*

protective principle. Rather, it merely suggested that '[t]o ensure that the application of this principle is in conformity with the general objectives of public international law, it should be confined to interests which are considered to be vital for the existence of the state, its institutions, and its constitutional and social order.' It concluded by proposing, *lex ferenda*, that jurisdiction for the protection of such interests should 'be in conformity with the State practice of a substantial part of the community of states', an approach referred to as a 'shared values approach'.¹³⁵

The work by the Committee of Experts raises two issues of great importance for the present chapter. First of all, and contrary to the proposal by the Committee of Experts, the present chapter does not adopt the 'shared values approach'. The reason for this is that the meaning of 'values' is overly vague and was proposed by the Committee of Experts merely as a general and abstract way of delimiting all grounds of jurisdiction under customary international law, rather than as a way of defining protective jurisdiction specifically. Such an approach, if it was to be adopted, would be impractical for national legislators and courts to implement. More fundamentally, this approach risks confusing grounds of extraterritorial jurisdiction, most notably protection and universality. Conceptually, it does not clearly distinguish vital State interests, a number of which may be shared by the international community, under the protective principle, with 'international community values', under the principle of universality. The need for conceptual clarity is all the more important in consideration of the collective belief, discussed above.

Secondly, the notion that protective jurisdiction is only valid for the protection of interests that are 'so vital for the State's existence', a view that has also been echoed more recently in legal scholarship, is incorrect.¹³⁶ The link between vital interests and the State's 'existence' dates back to the nineteenth century when the protection of vital interests fell within the broad right of self-preservation and the use of military force, to which reference has already been made in chapter two. That view has long been outdated; the protective principle is no longer part of self-preservation and a vital

¹³⁵ *Ibid.*, at p.468.

¹³⁶ Simma & Müller, *supra* n 95, at p.144.

interest does not require that an interest in question be a matter of the State's 'existence'. The ILC has reached the same conclusion.¹³⁷

A matter of great importance, then, as has already been noted by Mann, is an assessment of those vital interests that are capable of falling under the ambit of protective jurisdiction.¹³⁸ Lowe and Staker have suggested that only interests which are 'truly vital' may fall under protective jurisdiction.¹³⁹ It is far from clear, however, what interests are covered by this qualification. Nor can any clear answer be given as to why certain interests are 'vital' and others are not; there is no established test for the qualification of interests as 'vital' that has been put forward by U.N. organs, for example, by the ILC or ICJ. This is so even though since the founding of the U.N. such interests are undoubtedly admissible before ICJ.¹⁴⁰ This is made all the more problematic in that States have traditionally refrained from defining vital interests in arbitration treaties or subjecting them to compulsory adjudication before international tribunals 'as only the sovereign can be judge of them' and many arbitration treaties contained specific reservations to that effect.¹⁴¹ Likewise, the phraseology used by Security Council resolutions tends to be sufficiently broad to enable unilateral interpretations by its permanent members; resolution 1373 is a case in point.¹⁴² It is also worth noting that national laws criminalising conduct abroad generally do not refer to grounds of jurisdiction or define what vital interests they seek to protect.¹⁴³ The reason why States tend not to define vital interests in national laws may be due, in part, to the fact that grounds of jurisdiction and vital interests in particular have not been codified.¹⁴⁴ States may also prefer to retain discretion as to what interests may be protected by their domestic laws. It may be the case that national laws are left on the statute books and it is not until they are enforced or involved in inter-State disputes that States are prepared to justify and explain their extraterritorial application.

¹³⁷ ILCYB, 1980, vol.II (Part One), at p.49; Addendum to the Eighth Report on State Responsibility, by Mr. Roberto Ago, reprinted in *ibid.*, para.12.

¹³⁸ Mann, *supra* n 126, at p.94, n 184.

¹³⁹ *Supra* n 16, at p.326.

¹⁴⁰ See also *Fisheries Jurisdiction (U.K. v Iceland)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p.3.

¹⁴¹ Memoranda distributed by Russian delegates to members of the Hague Conference in 1899, in Westlake, J. (1910). 'International Law'. Cambridge: CUP, at pp.302-303; Lauterpacht, H. (1933). 'The Function of Law in the International Community'. Oxford: Clarendon Press; also Koskenniemi, M. (2008). 'The Function of Law in the International Community: 75 Years After'. 79 *BYIL* 353, at p.355.

¹⁴² S/RES/1373 (28 September 2001).

¹⁴³ Chapter four.

¹⁴⁴ Chapter six.

Paust has suggested that vital interests, ‘when viewed in context, should be of real significance’, which Paust believed ought to be decided by domestic courts.¹⁴⁵ The judicial interpretation of vital interests on a case-by-case basis, as suggested by Paust, is in principle unobjectionable. However, it comes no closer, *a priori*, to defining more clearly and with certainty the vital interests - as agreed by States - falling under protective jurisdiction *lex lata*. Moreover, domestic courts are not always best placed to determine such interests as a matter of custom.¹⁴⁶ The upshot of all this is that the meaning of vital interests is rather vague. While every State can determine such interests for itself, and some interests may be peculiar to particular States, the potential category of interests falling under protective jurisdiction is not limitless and that decision is ultimately subject to limits set by customary international law.¹⁴⁷ It is therefore necessary to examine State practice in order to determine this question.

The uncertain nature of vital interests provides a strong argument in support of, rather than against, the need to assess what these interests may include. Accordingly, the section that follows aims to dispel some of the ambiguity surrounding protective jurisdiction by trying to enumerate some of the vital interests that have been included under its ambit *lex lata* and around which some agreement appears to have clustered. A core category of these vital State interests appears to be shared by the international community and the approach to defining protective jurisdiction proposed by the present chapter, *lex ferenda*, is referred to as a ‘shared vital State interests’ approach. The requisite level of State practice needed to allow for the identification of a shared vital interest is less clear. It will be recalled that the Committee of Experts proposed that the protection of vital interests has to be ‘in conformity with the State practice of a substantial part of the community of states’.¹⁴⁸ On the other hand, the ILC, in determining whether State practice allows for the identification of a customary rule, has suggested that the requirements of ‘uniformity’ and ‘generality’ need to be fulfilled.¹⁴⁹ However, the ILC has employed diverse terminology when determining whether such

¹⁴⁵ Paust, J.J. ‘International Law Concerning Domestic Prosecutions of Al Qaeda Attacks’, in Heere, W.P. (ed.) (2004). ‘From Government to Governance: The Growing Impact of Non-State Actors on the International and European Legal System’. The Hague: Asser Press, at p.363.

¹⁴⁶ Chapter six.

¹⁴⁷ Lowe & Staker, *supra* n 16, at p.326; Akande, *supra* n 128, at p.474.

¹⁴⁸ *Supra* n 135.

¹⁴⁹ U.N. Doc.A/CN.4/659, *supra* n 63, paras.16-22.

practice satisfies these requirements, for example, ‘uniform practice’, ‘widely observed practice’, ‘established practice’ and ‘settled practice’.¹⁵⁰ This is one of the reasons why the ILC is working to codify the formation and evidence of customary rules.¹⁵¹ The present chapter aims to identify shared vital interests based on State practice, though whether such practice is sufficiently uniform will ultimately have to be determined by States in the codification of protective jurisdiction.¹⁵²

It is useful at this point to say a few words on the materials used to identify vital interests. The present chapter has inferred vital interests that appear to be underlying the categories of offences, identified in chapter four, which are based on a detailed empirical analysis of State practice. The same approach was used by the Harvard Research and proposed by Cameron. Given that these national laws are limited to the context of international terrorism and that the vital interests underlying them have been inferred by the present author, the present work is intended to be of indicative value. In addition to these national laws, there are a number of other sources by which the inclusion of vital interests under protective jurisdiction may be verified. These sources provide supporting evidence that such interests sufficiently qualify as ‘vital’. The first of these is judicial practice.¹⁵³ The second is international and regional counter-terrorism treaties. Treaties are a primary source of international law.¹⁵⁴ Furthermore, the empirical analysis of State practice in chapter four includes national laws implementing treaties. States are motivated to negotiate and adopt treaties in response to common threats to certain of their vital interests and there has in recent years been a trend in treaty practice to permit or require extraterritorial jurisdiction over proscribed conduct for the protection of such interests.¹⁵⁵ Treaties thus indicate more clearly the vital State

¹⁵⁰ *Ibid.*, para.20.

¹⁵¹ U.N. Doc.A/CN.4/653 (2012).

¹⁵² Chapter six.

¹⁵³ See also National Security Division of the Justice Department, ‘Introduction to National Security Division Statistics on unsealed International Terrorism and Terrorism-Related Convictions, available online:

www.fas.org/irp/agency/doj/doj032610-stats.pdf; NYU, Centre on Law and Security, ‘Terrorist Trial Report Card: September 11, 2001-September 11, 2010’, 2010.

¹⁵⁴ I.C.J. Statute, Article 38(1)(a).

¹⁵⁵ See also UNODC, ‘Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols’, New York: U.N. (2003), at p.27; UNODC, ‘Legislative Guide to the Universal Legal Regime Against Terrorism’, New York: U.N. (2008), at pp.34-35; UNODC, ‘Draft Model Legislative Provisions against Terrorism’ (2009), available online:

www.un.org/en/sc/ctc/docs/bestpractices/undoc_modellegislation.doc;

Technical Guidance to the Implementation of Security Council Resolution 1373 (2001), (2009) Compiled by the Counter-Terrorism Committee Executive Directorate, at p.30; Akande, *supra* n 128, at p.474.

interests that are shared by the international community. States are obliged by resolution 1373 to become parties to these treaties. It has to be stressed, however, that theories relating to grounds of jurisdiction and vital interests are not specified by treaties; rather they provide for specified conditions for the exercise of extraterritorial jurisdiction where there is a connection with the legislating State. The present work is not intended to provide a detailed analysis of each of these treaties, which has been undertaken elsewhere.¹⁵⁶ Lastly, the chapter takes into consideration, where applicable, the practice of the General Assembly and Security Council in response to international terrorism.

5.5. Shared Vital State Interests

The following vital interests have been included under the ambit of protective jurisdiction *lex lata*:

- (i) Sovereignty;
- (ii) Territorial integrity;
- (iii) Political independence;
- (iv) Constitution;
- (v) Security;
- (vi) Nationals;
- (vii) Personnel and property;
- (viii) Heads of State/government;
- (ix) Registered aircraft and vessels;
- (x) Fixed platforms;
- (xi) Currency and official documents;
- (xii) Fundamental social, political, constitutional and economic order; and
- (xiii) International organisations.

Not all of these interests are shared by the international community, namely fixed platforms; fundamental social, political, constitutional and economic order; and international organisations. It is not possible, due to the scope of the present chapter, to discuss each of these vital interests in depth; rather, the aim here is to analyse a number of these interests in order to show that they have sufficient uniformity in State practice and may be regarded as being shared. It is worth noting that these vital interests are not necessarily ideal types and may converge; for example, offences committed against the

¹⁵⁶ Boed, R. 'United States Legislative Approach to Extraterritorial Jurisdiction in Connection with Terrorism', in Bassiouni, M.C. (1999). 'International Criminal Law'. Ardsley: Transnational, at pp.152-159; Sambei, A. & Plessis, A. & Polaine, M. (2009). 'Counter-Terrorism Law and Practice'. Oxford: OUP, chapters 2 & 3; U.N., 'International Instruments Related to the Prevention and Suppression of International Terrorism', New York: U.N. (2008).

State's personnel and property may also be regarded as a threat to that State's sovereignty, security, political independence, depending, of course, on how broadly these latter terms are defined.

5.5.1. Sovereignty; Territorial Integrity; Political Independence; and Constitution

The State's territorial integrity, political independence and constitution have long been regarded by many States as being related to the concept of sovereignty and therefore each of these vital interests are discussed here together under the same sub-heading. The national laws of 76 States have used protective jurisdiction over offences committed against their sovereignty, territorial integrity, political independence and constitution. Protective jurisdiction has also been included in the majority of counter-terrorism treaties over offences committed against the State's independence, which is commonly expressed in terms of acts committed in an attempt 'to compel that State to do or abstain from doing any act'.¹⁵⁷ These conventions include the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (the Maritime Convention and Fixed Platforms Protocol);¹⁵⁸ 1994 Convention on the Safety of United Nations and Associated Personnel;¹⁵⁹ the Bombings Convention;¹⁶⁰ 1999 International Convention for the Suppression of the Financing of Terrorism (the Financing Convention);¹⁶¹ 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (the Nuclear Terrorism Convention);¹⁶² and the draft Comprehensive Convention on International Terrorism (the draft comprehensive convention).¹⁶³ While protective jurisdiction is a permissive ground of jurisdiction in the aforementioned conventions, this jurisdiction is mandatory in the 1979 International Convention Against the Taking of Hostages (the

¹⁵⁷ See also *supra* n 17, para.388; 1999 Convention of the Organisation of the Islamic Conference on Combating International Terrorism (the OIC Convention), Article 1.

¹⁵⁸ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1678 U.N.T.S. 222, Article 6(2)(c); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1678 U.N.T.S. 304, Article 3(2)(c).

¹⁵⁹ 2051 U.N.T.S. 363, Article 10(2)(c).

¹⁶⁰ *Supra* n 79, Article 6(2)(d).

¹⁶¹ 2178 U.N.T.S. 197, Article 7(2)(c).

¹⁶² 2445 U.N.T.S. 89, Article 9(2)(d).

¹⁶³ Article 6(2); see U.N. Doc.A/C.6/51/6 (1996).

Hostages Convention).¹⁶⁴ The State's territorial integrity and independence are also frequently referred to in the preambular paragraphs of these conventions.¹⁶⁵

The protection of independence is reflected in Security Council practice. In 2004 the Security Council adopted resolution 1566 under Chapter VII of the U.N. Charter, providing for a basic, working definition of 'terrorism', although it is not expressly framed as such. This resolution merits special mention because it requires as its purposive element that an offence be committed, by its nature or context, to 'compel a government' or 'intimidate a population'.¹⁶⁶ The Security Council, it will be recalled from chapter four, also required in the same resolution that States 'cooperate fully' with those States where 'terrorist acts' are committed and, to that end, to provide in their domestic law for broad treaty-based jurisdiction under the extradite or prosecute principle in relation to 'any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens'.¹⁶⁷ The purposive element of 'terrorism', as defined by the Security Council, signifies precisely why international terrorism is regarded by States as problematic. Indeed, the purposive element *inter alia* was taken from the Financing Convention and has been included in the proposed definition of 'terrorism' by the draft comprehensive convention, both of which, as noted above, provide for protective jurisdiction over relevant offences committed against the State's independence.¹⁶⁸

In that regard, it is worth noting that the Financing Convention provides for protective jurisdiction, by virtue of Article 7(2)(a), when the offence of collecting funds, as defined by Article 2(1), is committed abroad and one of the offences referred to in Article 2(1)(a) or (b), including an offence under one of nine counter-terrorist conventions, 'was directed towards or resulted in the carrying out of an offence ... in the territory of ... that State'. The wording of the provision *inter alia* is sufficiently broad to encompass the protection of certain vital interests other than independence, for example, the State's sovereignty, territorial integrity, constitution, security and

¹⁶⁴ 1316 U.N.T.S. 205, Article 5(1)(c).

¹⁶⁵ Bombings Convention, *supra* n 79, preambular para.4; Financing Convention, *supra* n 161, preambular para.4; draft comprehensive convention, *supra* n 163, preambular paras.5 & 8.

¹⁶⁶ S/RES/1566 (8 October 2004), para.3.

¹⁶⁷ *Ibid.*, para.2.

¹⁶⁸ Financing Convention, *supra* 161, Article 2(1)(b); draft comprehensive convention, *supra* n 163, Article 2(1)(a). See also 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (the Beijing Convention and Protocol), Article 1(1)(i)(1) (not yet in force).

nationals. During the proceedings of the Ad Hoc Committee on Terrorism for the establishment of the draft comprehensive convention, delegations noted that ‘acts of terrorism constituted a major factor threatening the stability and sovereignty of States’,¹⁶⁹ and well as their territorial integrity and the functioning of democratic institutions.¹⁷⁰ In that connection, it is notable that this convention proposes to permit the State, by virtue of Article 6(2), to establish jurisdiction over offences set out in Article 2 which are committed ‘wholly or partially outside its territory, if the effects of the conduct or its intended effects constitute or result in, within its territory’. Protective jurisdiction is applicable where an offence has ‘intended effects’ within the State’s territory, which is broad enough to encompass offences that implicate or threaten sovereignty, territorial integrity and constitution, as well as security.¹⁷¹

In response to the 14 February 2005 ‘terrorist bombing’ in Beirut, Lebanon, which killed former Lebanese Prime Minister Rafiq Hariri and 22 others, and caused injury to 220 other people, the Security Council adopted a resolution under Chapter VII and determined that ‘the involvement of any State in this terrorist act would amount to ‘a serious violation of its obligation to respect the sovereignty and political independence of Lebanon’. The Security Council, noting with ‘extreme concern’ the conclusion by the International Independent Investigation Commission that the ‘terrorist act’ could not have been carried out without the involvement of Syrian officials, insisted that ‘Syria not interfere in Lebanese domestic affairs, either directly or indirectly, refrain from any attempt aimed at destabilizing Lebanon, and respect scrupulously the sovereignty, territorial integrity, unity and political independence of this country’.¹⁷² The Security Council *inter alia* also expressed its readiness to consider additional requests from the Lebanese Government to ensure that all those involved in the planning, sponsoring, organizing and perpetrating of this ‘terrorist act’ are brought to justice.¹⁷³ To that end, the Security Council, at the request of the Lebanese Government, and acting under Chapter VII, created the Special Tribunal for Lebanon in order to bring to trial those

¹⁶⁹ U.N. Doc.A/60/37(2005), Annex I, at p.17.

¹⁷⁰ U.N. Doc.A/65/37(2010), Annex I, at p.5; U.N. Doc.A/66/37(2011), Annex I, at p.5.

¹⁷¹ On the practice of regional organisations, see 1998 Arab Convention on the Suppression of Terrorism, preamble; OIC Convention, *supra* n 149, preamble and Article 1; 1999 Organisation of African Unity Convention on the Prevention on Combating Terrorism, Article 6 (the OAU Convention).

¹⁷² See S/RES/1636 (31 October 2005), preambular paras.2 & 4 & operative paras.2, 4, & 12; also S/RES/1595 (7 April 2005), preambular para.1

¹⁷³ *Ibid.*, operative paras.7 & 14.

accused.¹⁷⁴ The tribunal was granted subject matter jurisdiction specifically in relation to crimes under the Lebanese Penal Code.¹⁷⁵ The domestic law of Lebanon does not provide for universal jurisdiction¹⁷⁶ and the applicable crimes *inter alia*, for example, ‘acts of terrorism’, ‘illicit associations’ and crimes of conspiracy apply outside Lebanon under the protective principle. In effect, the tribunal amounts to the recognition by the Security Council that acts of international terrorism are capable of threatening the State’s sovereignty, territorial integrity and political independence. There appears to be tacit authorisation by the Security Council for the use of protective jurisdiction in order to protect these interests from international terrorism, enforced not by Lebanese domestic courts but rather by a ‘tribunal of an international character’.¹⁷⁷

5.5.2. Nationals

The national laws of 75 States have provided for protective jurisdiction over acts of terrorism and serious crimes committed in time of peace against their nationals inside and outside national territory. The importance of protecting the State’s nationals from terrorist acts is also evidenced by counter-terrorism treaties. The first international convention was the Hostages Convention, which was adopted in response to the increasing number of acts of international terrorism committed against the State’s diplomatic personnel, though it is applicable to offences committed against the State’s nationals more generally. The Hostages Convention focuses on the effect of the hostage taking on the State of nationality or an intergovernmental organisation. Article 1 *inter alia* creates an offence of hostage-taking where it is to ‘compel’ a State or intergovernmental organisation ‘to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage’. Article 5(1)(c) establishes protective jurisdiction as a primary and mandatory basis of jurisdiction when an offence set forth in Article 1 is committed ‘[i]n order to compel that State to do or abstain from doing any act’, or by virtue of Article 5(1)(d), ‘[w]ith respect to a hostage who is a national of that State, if that State considers it appropriate’.

¹⁷⁴ S/RES/1664 (29 March 2006); S/RES/1757 (30 May 2007).

¹⁷⁵ Statute of the Special Tribunal for Lebanon, Article 2.

¹⁷⁶ Letter from the Permanent Mission of Lebanon to the Codification Division of the U.N. Office of Legal Affairs (2010).

¹⁷⁷ ‘Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon’, Annexed to S/RES/1757, *supra* n 174.

The Maritime Convention, which was precipitated by the *Achille Lauro* incident in 1985, establishes protective jurisdiction when an offence is committed on board a foreign flag ship and ‘during its commission a national of that State is seized, threatened, injured or killed’.¹⁷⁸ The Fixed Platforms Protocol establishes protective jurisdiction in identical terms to the Maritime Convention.¹⁷⁹ The State’s nationals are also protected by the Bombing Convention. The convention *inter alia*, as indicated by its preamble, was adopted in response to ‘increasingly widespread’ acts of terrorism by means of explosives.¹⁸⁰ The broad consensus among States as to the need to protect certain of their vital interests from such attacks may have been the reason why the convention was adopted unusually quickly.¹⁸¹ The convention creates an offence under Article 2(1)(a) of unlawfully and intentionally delivering, placing, discharging, or detonating an explosive or other lethal device in, into, or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility ‘[w]ith the intent to cause death or serious bodily injury’. The convention, by virtue of Article 6(2)(a), establishes protective jurisdiction over offences set forth in Article 2 when ‘[t]he offence is committed against a national of that State’. It is irrelevant as to whether a State’s national is located within or outside national territory, as long as an offence is international in character.¹⁸² The convention also criminalises attempt; participating as an accomplice; organising or directing others; and contributing ‘in any other way’ to a group of persons acting with a common purpose, to commit an offence under Article 2(1)(a), all of which are capable of falling under protective jurisdiction if committed abroad.

The Financing Convention, to which reference has already been made, permits States parties to establish protective jurisdiction, by virtue of Article 7(2)(a), when the offence of collecting funds, as defined by Article 2(1), is committed abroad and an offence referred to in Article 2(1)(a) or (b) ‘was directed towards or resulted in the carrying out of an offence ... in the territory of or against a national of that State’. As with the Bombings Convention, it is irrelevant whether a State’s national is within or outside

¹⁷⁸ *Supra* n 158, Article 6(2)(b). See McGuinley, G. (1985). ‘The Achille Lauro Affair – Implications for International Law’. 52 *Tenn.L.R.* 691.

¹⁷⁹ *Ibid.*, Article 3(2)(b).

¹⁸⁰ *Supra* n 79, preambular para.7.

¹⁸¹ See Klein, P. (2009). ‘International Convention for the Suppression of Terrorist Bombings’, available online: www.un.org/law/avl, at p.1.

¹⁸² *Supra* n 79, Article 3.

national territory, as long as the offence is international in character. As the convention's focus is the criminalisation of the collection of funds, it is not 'necessary that the funds were actually used to carry out an offence' set forth in Article 2(1).¹⁸³ The convention also criminalises attempts, participation as an accomplice, or organising or directing others to collect funds under Article 2(1). This creates potentially expansive jurisdiction under the protective principle. The other international conventions which establish protective jurisdiction over offences committed against the State's nationals include the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (the Tokyo Convention);¹⁸⁴ Nuclear Terrorism Convention;¹⁸⁵ 2010 Beijing Convention and Protocol;¹⁸⁶ and the draft comprehensive convention.¹⁸⁷

In the Lockerbie incident, the U.S. asserted its jurisdiction over the alleged offence of placing on board an aircraft an explosive device, pursuant to Article 5(1)(b) of the Montreal Convention, on the ground that the aircraft was registered in the U.S. and U.S. nationals were among the victims.¹⁸⁸ As the alleged offenders were present in Libya and the Libyan Government refused to extradite them, the U.S. subsequently approached the Security Council. After the indictments against the alleged offenders had been handed down by a U.S. District Court and conveyed to Libya, the U.S. made a statement to the Security Council, in 'concert' with Britain and France, declaring that Libya must, amongst other things, 'surrender for trial all those charged with the crime'.¹⁸⁹ When extradition was not forthcoming, the U.S. and Britain negotiated with the Security Council the imposition of sanctions on Libya under Chapter VII, designed to coerce Libya to 'surrender' the two suspects for trial abroad and calling on all States to assist in the apprehension and prosecution of those responsible.¹⁹⁰ The suspension of sanctions was conditioned on Libya surrendering those charged for trial in a U.S. or British court

¹⁸³ *Supra* n 161, Article 2(3).

¹⁸⁴ 10106 U.N.T.S. 220, Article 4(b).

¹⁸⁵ *Supra* n 162, Article 9(2)(a).

¹⁸⁶ *Supra* n 168, Article 8(2)(a) and Article 4(2)(a), respectively.

¹⁸⁷ *Supra* n 163, Article 6(2). See also OAU Convention, *supra* n 171, Article 6; Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, O.J. L 164 of 22 June 2002, p.3, Article 9(1)(c); Peers, J. (2003). 'EU Responses to Terrorism'. 52 *ICLQ* 227.

¹⁸⁸ See also *Yunis*, *supra* n 12; *Yousef*, *supra* n 74; *U.S. v Mustafa Kamel Mustafa et al.*, S2 04 Cr.356 (JFK) (S.D.N.Y., 2006)(Indictment); *Mustafa Kamel Mustafa (Otherwise Abu Hamza) v The Government of the United States of America for the Home Department*, [2008] EWHC 1357 (Admin).

¹⁸⁹ Letter dated 20 December 1991 from the Permanent Representative of the U.S. to the U.N. addressed to the Secretary-General, U.N. Doc.S/23308 (31 December 1991).

¹⁹⁰ S/RES/731 (21 January 1992); S/RES/748 (31 March 1992); S/RES/883 (11 November 1993).

and satisfaction of French judicial authorities.¹⁹¹ The reference to French judicial authorities was because a number of Libyan nationals were also wanted in connection with the 1989 bombing of Union des Transports Aériens flight 772 over Niger.¹⁹² In effect, the practice of the Security Council in response to the Lockerbie incident indicates a recognition by the Security Council of the right of States to protect their nationals from acts of terrorism and a sanction to exercise protective jurisdiction by the U.S.; to that end the Security Council was prepared to use its mandatory powers so that the U.S. could enforce that jurisdiction. This is further indicated by resolution 731, in which the Security Council reaffirmed the right of States, ‘in accordance with the U.N. Charter and relevant principles of international law’, to protect their nationals from acts of international terrorism.¹⁹³

The same can be said *mutatis mutandis* in respect of the assertion of protective jurisdiction by the U.S. in response to the bombing of its embassies and the killing of its nationals in Kenya and Tanzania in 1998.¹⁹⁴ The extradition of the alleged offenders to the U.S. was not forthcoming and so the U.S. negotiated with the Security Council the imposition of sanctions on the Taliban regime, under the belief that bin Laden and al-Qaeda were behind those bombings and were stationed and training in Afghanistan, and for the refusal of the Taliban, following diplomatic pressure, to surrender bin Laden for trial abroad by the U.S. The Security Council initially responded by strongly condemning the ‘terrorist bomb attacks’ and calling upon all States to support the U.S. in bringing the perpetrators to trial.¹⁹⁵ This was followed by demands that the Taliban ‘stop providing sanctuary and training for international terrorists and their organizations, and that all Afghan factions cooperate with efforts to bring indicted terrorists to justice’.¹⁹⁶ The failure of the Taliban to comply with these resolutions subsequently prompted the Security Council to take measures under Chapter VII by imposing a series of sanctions on individuals belonging to or associated with the Taliban to ensure that the Taliban ‘comply with previous resolutions’ and to:

¹⁹¹ S/RES/731, *ibid.*; Letter dated 20 December 1991 from the Permanent Representative of the U.K. to the U.N. addressed to the Secretary-General, U.N. Doc.S/23307 (31 December 1991).

¹⁹² Letter dated 20 December 1991 from the Permanent Representative of France to the U.N. addressed to the Secretary-General, U.N. Doc.S/23306 (31 December 1991).

¹⁹³ *Supra* n 190, preambular para.2.

¹⁹⁴ *Infra.*

¹⁹⁵ S/RES/1189 (13 August 1998), paras.1 & 3.

¹⁹⁶ S/RES/1214 (8 December 1998), para.13; also S/RES/1193 (28 August 1998), para.15.

take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice.¹⁹⁷

The Security Council specifically demanded that the Taliban ‘turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted’.¹⁹⁸ This was an indirect reference by the Security Council to ‘the indictment of Usama bin Laden and his associates’ by the U.S. for conspiring to kill American nationals abroad and the request by the U.S. to the Taliban to ‘surrender them for trial’.¹⁹⁹ The ‘failure’ of the Taliban to assist the U.S. in bringing to trial suspected terrorists was deemed to constitute a threat to international peace and security.²⁰⁰ The Security Council thus made specific reference, and expressly affirmed the right of the U.S., to exercise extraterritorial jurisdiction over acts of terrorism against its nationals, although the Security Council did not use the nomenclature ‘protective principle’ as such. That the jurisdiction of the U.S. was based on the protective principle was subsequently confirmed in the landmark case of *U.S. v Bin Laden*.²⁰¹

As regards more recent Security Council practice, the Council has used its Chapter VII powers to oblige States to prevent their territories from being used to commit ‘terrorist acts’ against the citizens of ‘other States’²⁰² and to cooperate with those States against whose citizens ‘terrorist acts’ are committed, by making provision in national laws for the extradite or prosecute principle.²⁰³ Extradite or prosecute, as explained above, also requires broad, mandatory prescriptive jurisdiction, which States are able to use in order to protect certain of their vital interests, including where terrorist acts are committed against their nationals. It is worth recalling the purposive element of the Security Council’s definition of ‘terrorism’ in resolution 1566, above, which indicates that States are concerned with protecting their nationals from international terrorism.²⁰⁴ The

¹⁹⁷ S/RES/1267 (15 October 1999), para.1.

¹⁹⁸ *Ibid.*, para.2; also S/RES/1214 (8 December 1998), preambular paras.5-6.

¹⁹⁹ *Ibid.*, preambular para.7; also S/RES/1269 (19 October 1999), para.4; Murphy, S.D. (ed.) (2000). ‘Efforts to Obtain Custody of Osama Bin Laden’, 94 *AJIL* 366.

²⁰⁰ *Ibid.*, preambular para.8; also S/RES/1333 (19 December 2000), preambular para.14; S/RES/1333 (19 December 2000), preambular paras.14; preambular paras.10-11, 14 & operative paras.1-2; S/RES/1390 (28 January 2002), preambular paras.4-8.

²⁰¹ *Bin Laden*, *supra* n 12, at p.221.

²⁰² S/RES/1373, *supra* n 142, para.2(d).

²⁰³ S/RES/1566, *supra* n 166.

²⁰⁴ See also A/RES/49/60 (9 December 1994), para.5(a); A/RES/60/288 (20 September 2006), Article II(1).

establishment by the Security Council of the Special Tribunal for Lebanon, discussed above, was partly in response to acts of international terrorism committed against Lebanese nationals in the territory of Lebanon. More recently, the Security Council, acting under Chapter VII, has condemned the ‘terrorist acts’ of Islamic State in Iraq and the Levant (ISIL) and Al Nusrah Front (ANF) and ‘associated armed groups’ and strongly condemned the taking of hostages. The Security Council has also urged all States, in accordance with their obligations under resolution 1373, ‘to cooperate in efforts to find and bring to justice’ individuals and ‘foreign terrorist fighters’ associated with these groups who perpetrate, organise and sponsor terrorist acts.²⁰⁵ This resolution was adopted partly in response to the taking hostage of some of the nationals of the Security Council’s members. In response to the murder of U.S. and British nationals held hostage by ISIL, the Security Council has underlined the need to bring the perpetrators of these acts of terrorism to justice and urged all States, in accordance with their obligations under international law and relevant Council resolutions, to cooperate actively with the U.S. and Britain in this regard.²⁰⁶

The Security Council has recently adopted a resolution condemning in the ‘strongest terms’ the downing of Malaysia Airlines flight MH17, on 17 July 2014, in Ukraine resulting in the loss of all 298 passengers and crew on board that comprised ten different nationalities, including the nationals of some of the members of the Council.²⁰⁷ This resolution was not adopted under Chapter VII, due to the split between Russia and other Security Council members on the situation in Ukraine. The Security Council not only expressed its deepest condolences to the victims and ‘governments of the victims’ countries of origin’, and demanded that ‘all States and other actors refrain from acts of violence directed against civilian aircraft’,²⁰⁸ but it also reaffirmed the ‘rules of international law that prohibit acts of violence that pose a threat to the safety of international civil aviation’ and recognised the efforts made by ‘States who have lost nationals on MH17, to institute an international investigation of the incident, and *call[ed] on* all States to provide any requested assistance to civil and criminal

²⁰⁵ S/RES/2170 (15 August 2014), preambular para.9 & operative paras.5 & 8.

²⁰⁶ Press Statement, Murder of James Foley, SC/11531-IK/689 (22 August 2014); Press Statement, Murder of Steven Sotloff, SC11550 (6 September 2014); Press Statement, Murder of David Haines, SC11557 (14 September 2014); Press Statement, Murder of Alan Henning, SC11590 (3 October 2014).

²⁰⁷ S/RES/2166 (21 July 2014), para.1. See also Press Statement, Malaysian Plane Crash, SC11480 (18 July 2014).

²⁰⁸ *Ibid.*, paras.2, 14.

investigations related to this incident'.²⁰⁹ To that end, the Security Council demanded that 'those responsible for this incident be held to account and that all States cooperate fully with efforts to establish accountability'.²¹⁰ The reference by the Security Council to the violation of 'rules of international law that prohibit acts of violence that pose a threat to the safety of international civil aviation' is notable in that the Montreal Convention and the Tokyo Convention provide for protective jurisdiction. The Security Council explicitly recognised the right of 'States who have lost nationals' to exercise extraterritorial jurisdiction, which implicitly includes the protective principle, in order to hold the alleged offenders criminally accountable. The response by the Security Council to this incident is the most recent institutional practice and *opinio juris* that States are permitted to use protective jurisdiction over acts of terrorism and serious offences when their vital interests are implicated. The Security Council also affirmed *inter alia* that 'all States cooperate fully with efforts to establish accountability' by those 'States who have lost nationals' undertaking criminal investigations 'related to this incident'.

5.5.2.1. Protective and Passive Personality Jurisdiction

The basis of jurisdiction over terrorist acts abroad committed against the State's nationals has given rise to considerable misunderstanding by courts and in legal scholarship in relation to the question of passive personality jurisdiction.²¹¹ The confusion as to the proper basis of jurisdiction is due to an over-reliance on tentative, secondary sources, and stems largely from the *Eichmann* case and the Restatement (Third). In the *Eichmann* case, Israel invoked both the protective and passive personality principles over war crimes and crimes against the Jewish people during World War II. The reason why Israel sought to rely on both grounds of jurisdiction may have been because there was, at that time, little understanding of what such grounds comprised. This is further indicated by the District Court *inter alia* holding that 'the principle of "passive personality" ... stems from the protective principle'.²¹² The Supreme Court 'fully agree[d] with every word said by the [District Court] in upholding its 'jurisdiction by virtue also of the "protective principle" and the principle of "passive

²⁰⁹ *Ibid.*, preambular para.2 & operative para.4 (italics original).

²¹⁰ *Ibid.*, preambular para.2 & operative para.11.

²¹¹ Simma and Müller, *supra* n 95, at p.143.

²¹² *Attorney-General of Israel v Eichmann* (1961) (District Court), 36 ILR 5, at p.54.

personality”²¹³ It is fair to conclude that the court confused the theory of passive personality with that of protection.²¹⁴

Since *Eichmann*, courts and commentators have extended passive personality to include acts of terrorism, even though the facts of those cases would suggest that jurisdiction was really based on the protective principle.²¹⁵ The source of this misunderstanding stems from the Restatement (Third), which conflated the passive and protective principles by asserting that passive personality is ‘increasingly accepted as applied to terrorist and other organised attacks on a state’s nationals by reason of their nationality, or to assassination of a state’s diplomatic representatives or other officials.’²¹⁶ In support of this assertion, the Restatement relied exclusively on the 1986 Omnibus Diplomatic Security and Anti-Terrorism Act, section 2331, which applies extraterritorially based on protective jurisdiction.²¹⁷ To be sure, section 2331 requires as a prerequisite for prosecution that an offence is ‘intended to coerce, intimidate, or retaliate against a government or a civilian population’.²¹⁸ The District Court in the case of *Bin Laden* regarded conspiracy to kill U.S. nationals abroad under 18 U.S.C. 2332, which amended 18 U.S.C. 2331, as falling under the protective principle, on the ground that Congress intended this provision to have a ‘protective function’.²¹⁹ It would appear that it is in the interest of States to protect their nationals from acts of terrorism and such offences also impact the State’s sovereignty, political independence and governmental functions.²²⁰ The U.K. Home Affairs Committee has stated that ‘[i]n recent times there have been reminders of the global nature of the terrorist threat and its ability to impact

²¹³ *Supra* n 95, at p.304.

²¹⁴ See Garrod, *supra* n 25, at p.809.

²¹⁵ *Arrest Warrant*, *supra* n 16, at pp.77-78 (J. Sep. Op. of Judges Higgins *et al.*); *Yousef*, *supra* n 74, at p.96; *U.S. v Hill*, 279 F.3d731 (9th Cir., 2002), at p.739; *U.S. v Rezaq*, 134 F.3d1121 (D.C., Cir., 1998), at p.1133; U.N. Doc.A/61/10 (2006), Annex E; Bates, S.E. & Goldstone, R., *et al.* (eds.) (2011). ‘Terrorism and International Law. Accountability, Remedies, and Reform. A Report of the IBA Task Force on Terrorism’. Oxford: OUP, at p.222; Higgins, R. (1994). ‘Problems and Process: International Law and How We Use it’. Oxford: OUP, at pp.68-69; McCarthy, G.J. (1989). ‘The Passive Personality Principle and Its Use in Combating International Terrorism’. 13 *FordhamInt’lL.J.* 298; Watson, R.G. (1993). ‘The Passive Personality Principle’. 28 *Texas ILJ* 1; Lowe & Staker, *supra* n 16, at p.330; Cafritz, E. & Tene, O. (2003). ‘Article 113-7 of the French Penal Code: The Passive Personality Principle’. 41 *Colum.J.Transnat’lL.* 585.

²¹⁶ Restatement (Third), *supra* n 14, para.402, Comment f.

²¹⁷ *Ibid.*, Reporters’ Note Three.

²¹⁸ 18 U.S.C. § 2331(e).

²¹⁹ *Bin Laden*, *supra* n 12, at p.221.

²²⁰ See also *Bin Laden*, *ibid.*; Blakesley, C.L., ‘Jurisdictional Issues and Conflicts of Jurisdiction’, in Bassiouni, C.M. (1988). (ed.). ‘Legal Responses to International Terrorism: U.S. Procedural Aspects’. The Netherlands: Martinus Nijhoff, at p.144.

upon UK interests.²²¹ The Committee *inter alia* proceeded to cite as examples the attack on In Amenas, in Algeria, which included six British citizens amongst the 40 dead, and the attack on the Westgate shopping Mall, in Nairobi, in which six British citizens also died. The distinction between protective and passive personality jurisdiction was made sufficiently clear by De Visscher, during the effort to codify jurisdiction by the League of Nations. According to De Visscher, no ‘good reasons’ exist in favour of an exception to territoriality ‘based upon the nationality of the victim’:

On the one hand, it can hardly be maintained that the general interests of a State have been attacked merely because one of its nationals has been the victim of an offence in a foreign country. On the other hand, the criminal law of the country where the offence has been committed owes foreigners such protection as will in general ensure the repression of such offences. The exception would therefore only be justified if one or other of these two considerations were invalid. This might be the case if the victim were the holder of a public office or, again, if the country where the offence was committed did not possess any criminal law worthy of the name.²²²

De Visscher proceeded to suggest that ‘in the absence of any territorial authority, it would seem clear that the State which is injured directly or through its nationals has at least as vital an interest as the State of which the accused is a national.’²²³ It follows that the Restatement and the cases which have relied upon it provide no support for the passive personality theory and should be reconsidered as examples of protective jurisdiction. The confused relationship between the protective and passive personality principles perhaps provides a useful example of the need to codify protective jurisdiction, not least to provide guidance to courts.

5.5.3. Personnel and Property

The State’s personnel and property may, for the purpose of presentation and analysis, be divided into three sub-categories. The first of these is personnel and property entitled to special protection by international law, which includes, for example, Heads of State/government and diplomatic personnel and embassies.²²⁴ The second sub-category comprises personnel and property not accorded special protection by international law.

²²¹ HC, Home Affairs Committee-Seventeenth Report, Counter-terrorism, 30 April 2014, para.7 & chapter 2; also, HC Debates, ‘Iraq: Coalition Against ISIL’, Vol.585, Col.1255, 26 September 2014, Col.1255.

²²² *Supra* n 111, at pp.258-259.

²²³ *Ibid.*

²²⁴ 1961 Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95, Articles 22 & 29. See also Barker, J.C. (2006). ‘The Protection of Diplomatic Personnel’. Aldershot: Ashgate.

This includes public officials and government agents, officers and employees carrying out official duties;²²⁵ and government buildings, premises, installations, infrastructure facilities and aircraft. It also includes public and private water, energy, fuel and communications systems.²²⁶ The third sub-category consists of military personnel and premises, installations, weapons, aircraft and vessels.²²⁷

The Internationally Protected Persons Convention establishes protective jurisdiction as a primary ground.²²⁸ Thus, Article 3(1)(c) establishes protective jurisdiction over offences set forth in Article 2, including threats, attempts and participation in such offences, which are ‘committed against an internationally protected person as defined in article 1 who enjoys his status as such by virtue of functions which he exercises on behalf of that State.’²²⁹ In the *Layton* case, the District Court indicated that persons entitled to special protection constitute a vital State interest in asserting that:

Congressmen were singled out for protection because of the position they hold in our constitutional government, because their protection is important to the integrity of the national government and therefore serves an important interest of the government itself.²³⁰

The court also regarded crimes committed against such persons when performing official duties, wherever in the world, threatened the State’s security and the ‘free and proper functioning of government’.²³¹ The court therefore found Article 3(1)(c) of the Internationally Protected Persons Convention and 18 U.S.C. § 1116, which incorporated that convention into U.S. domestic law, to be concerned with:

²²⁵ E.g., *U.S. v Vasquez-Velasco*, 15 F.3d833 (9th Cir., 1994), at p.841; *U.S. v Felix-Gutierrez*, 940 F.2d1200 (9th Cir., 1991), at p.1206; *U.S. v Benitez*, 741 F.2d1312 (11th Cir., 1984), at p.1316.

²²⁶ *Reumayr*, *supra* n 112.

²²⁷ E.g., *U.S. v al-Delaema*, 1:05cr-00337 (D.C., 9 September 2005)(Indictment); Press Release, U.S. Department of Justice, Iraqi-Born Dutch Citizen Sentenced to 25 Years in Prison for Terrorism Conspiracy Against Americans in Iraq (16 April 2009), available online: <http://www.justice.gov/opalpr/2009/April/09-nsd-355.html>; U.S. Office of Military Commissions, MC Form 458, Charge Sheet (3 January 2012) [Daqduq].

²²⁸ *Supra* n 100. See also A/RES/2328(XXII) (18 December 1967); Green, B.A. (1973-1974). ‘Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons: An Analysis’. 14 *Va.J.Int’l.L.* 703; Rozakis, L.C. (1974). ‘Terrorism and the Internationally Protected Persons in the Light of the ILC’s Draft Articles’. 23 *ICLQ* 32.

²²⁹ See also UNODC, *supra* n 17, para.387; Boed, *supra* 156, at pp.156, 167; Peers, *supra* n 197, at pp.233-234; 2005 Council of Europe Convention on the Prevention of Terrorism, ETS No.196, Article 14(2)(b); OAU Convention, *supra* n 171, Article 6; Council Framework Decision, *supra* n 187, Article 9(1)(e).

²³⁰ *Layton*, *supra* n 12, at pp.216-220.

²³¹ *Ibid.*

[p]rotecting the integrity and vital interests of this nation, in the context of the threat of terrorism, which can by its nature strike out at the United States anywhere in the world. This is clear not only from the nature of the legislation and its congressional history, but from the impetus of these international treaties, designed to deal with a problem which nations throughout the world feel to be a threat to their integrity and which cannot be adequately dealt with within the confines of their own borders.²³²

Notwithstanding the reasoning of the District Court in *Layton*, it has been suggested by some courts and in legal scholarship that the theory of jurisdiction underlying Article 3(1)(c) is based on passive personality.²³³ The apparent confusion surrounding the proper basis of jurisdiction under Article 3(1)(c) is explained by the convention's *travaux préparatoires*. The draft article, which eventually became Article 3, *inter alia*, referred to the nationality of victims as a basis for jurisdiction as nothing more than a way of restricting the scope of the State's extraterritorial jurisdiction and in refutation of a proposal by the ILC of a theory of universal jurisdiction.²³⁴ The theory of passive personality is at odds with Article 3(1)(c), which requires the sending State to establish jurisdiction over crimes committed against an internationally protected person, not by reason of his nationality, but because he 'enjoys his status as such by virtue of functions which he exercises on behalf of that State.' It is precisely for this reason that the convention does not cover crimes committed against the State's nationals more generally, a proposition which was raised, but ultimately rejected, at the first debate of the ILC.²³⁵

Protective jurisdiction has been at the heart of recent U.S. cases for the prosecution of acts of terrorism, and conspiracy to commit such acts, committed against embassies and diplomatic personnel, as well as property and employees not entitled to special protection, located abroad and within the U.S. In respect of the former, the case of *Bin Laden* concerned the almost simultaneous detonation of two bombs in front of U.S. embassies in Kenya and Tanzania on 7 August 1998.²³⁶ The bombs caused significant destruction, killing 11 people and injuring 85 in Tanzania, and killing 213 individuals,

²³² *Ibid.*, at pp.224-225.

²³³ *Ibid.*, at pp.216, 223; Wood, M.C. (1974). 'The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents'. 23 *ICLQ* 791, at p.808; Cameron, *supra* n 128, at p.77; Green, *supra* 228, at p.175; Sambei *et al.*, *supra* n 156, at pp.131, 139.

²³⁴ Green, *ibid.*, at p.715.

²³⁵ ILCYB, 1972, vol.II, at pp.5-6.

²³⁶ See Barker, *supra* n 224, chapter 5; Murphy, S.D. (1999). 'Contemporary Practice of the United States'. 93 *AJIL* 161, at pp.162-163.

44 of whom were U.S. embassy employees, and injuring 4000 others in Nairobi.²³⁷ The indictment charged Osama bin Laden and 15 others with the embassy bombings as well as several other terrorist acts against U.S. military facilities and other property and personnel abroad since 1991.²³⁸ By the end of 2000, the indictment had been amended, bringing the number of named suspects to 21.²³⁹ At trial, during the first stage of the proceedings, four of the defendants challenged the extraterritorial application of various U.S. statutes which formed the basis of the indictment. It was argued that the majority of counts in the indictment should be dismissed because the acts allegedly committed outside U.S. territory were based on statutes that ‘were not intended by Congress to regulate conduct outside United States territory’.²⁴⁰ The court, in rejecting this argument, found that the extraterritorial application of a range of U.S. statutes named in the indictment, many of which include broad and inchoate offences which never before had been considered in relation to the conduct of foreign nationals abroad, to be consistent with the protective principle.²⁴¹ The validity of protective jurisdiction *inter alia* was subsequently reaffirmed in the trial of one of the suspects named in the indictment for the embassy bombings.²⁴² This ground of jurisdiction is also being used to prosecute Abu Khatallah, who is charged with the attack on 11 September 2012 of a U.S. diplomatic mission and the killing of four U.S. government personnel, including a U.S. Ambassador, in Benghazi.²⁴³

As regards the use of protective jurisdiction in cases concerning acts of terrorism committed against personnel and property not entitled to special protection, notable examples include the indictment of Ahmed Ibrahim al-Mughassil and 13 others for bombing Khobar Towers, a military housing complex used by the U.S. in Saudi Arabia, on 25 June 1996.²⁴⁴ The defendants were also charged with conspiracy outside the U.S.

²³⁷ ‘Report of the Accountability Review Boards, Bombings on the Embassy Bombings in Nairobi and Dar es Salaam on August 7, 1998’, January 1999, available online: www.state.gov/regions/africa/accountability_report.html.

²³⁸ *U.S. v Bin Laden*, 92 F.Supp.2d225 (S.D.N.Y., 15 March 2000), at pp.228-231.

²³⁹ *U.S. v Bin Laden et al.*, S(9)98 Cr.1023(LBS) (S.D.N.Y., 4 November 1998)(Indictment).

²⁴⁰ *Bin Laden*, *supra* n 12, at p.192.

²⁴¹ *Ibid.*, at pp.196-198.

²⁴² *U.S. v Ghailani*, 761 F.Supp.2d167 (S.D.N.Y., 21 January 2011).

²⁴³ *U.S. v Ahmed Abu Khatallah*, 1:14-cr-00141 (D.C., 26 June 2014)(Indictment); *U.S. v Ahmed Abu Khatallah*, 1:14-cr-00212 (D.C., 10 October 2014)(Indictment B); U.S. Senate Select Committee on Intelligence: Review of the Terrorist Attacks on U.S. Facilities in Benghazi, Libya, September 11-12, 2012 together with additional views’, 15 January 2014, at pp.40-42, available online: www.intelligence.senate.gov/benghazi2014/benghazi.pdf; also *U.S. v Manssor Arbabsiar and Ali Gholam Shakur*, 11 MAG 2617 (S.D.N.Y., 11 October 2011).

²⁴⁴ *U.S. Ahmed Ibrahim al-Mughassil et al.*, Criminal No:01-228-A (E.D.Va., June 2001)(Indictment).

to murder U.S. nationals, employees serving in their official capacity, federal employees, destruction of U.S. property and attack national defence premises in Saudi Arabia.²⁴⁵ Other notable examples include the indictment of Khalid Sheikh Mohammed and others for conspiracy outside the U.S. to destroy the Twin Towers arising out of the terrorist attacks on 11 September 2001.²⁴⁶ In *U.S. v Harun*, the defendant, a national of Saudi Arabia, was indicted on 20 March 2013 for conspiracy between 2001 and 2011, ‘within the extraterritorial jurisdiction of the United States’, to murder American military personnel in Afghanistan and conspiracy to bomb American diplomatic facilities in Nigeria.²⁴⁷ It is notable that other States have been willing to cooperate with the U.S. by extraditing alleged terrorists present in their territories, where extradition agreements are in place, for trial.²⁴⁸ This indicates that States have recognised the reciprocal benefit, and indeed the practical necessity, of protective jurisdiction for combating international terrorism, in particular for protecting certain of their vital interests abroad.

Protective jurisdiction has also been established in the Bombings Convention in relation to offences committed against diplomatic and consular premises as well as property not entitled to special protection under international law. The convention *inter alia* criminalises the act of intentionally delivering, placing, discharging or detonating an explosive or other lethal device in, into, or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

(a) With the intent to cause death or serious bodily injury; or

²⁴⁵ See also *Arbabsiar et al.*, *supra* n 243; *U.S. v Mohammed*, No.06-357 (D.C., 23 January 2008); *U.S. v Mohammed*, No.06-357 (D.C., 15 May 2008); *U.S. v Mohammed*, No.09-3001 (D.C. Cir., 4 September 2012), at p.16.

²⁴⁶ *U.S. v Khalid Sheikh Mohammed et al.*, (S14)93 Cr.180(KTD) (S.D.N.Y., 14 December 2009)(Indictment).

²⁴⁷ *U.S. v Ibrahim Suleiman Adnan Adam Harun*, Cr.No.12-134 (E.D.N.Y., 20 February 2012) (Indictment).

²⁴⁸ *Al-Delaema*, *supra* n 227; *Bin Laden*, *supra* n 12, at p.223; *Ghailani*, *supra* n 242; *Harun*, *ibid.*; *Al-Fawwaz and others* [2001] UKHL 69, in particular, paras.37-38 (Lord Slynn); paras.52, 64 (Lord Hutton); paras.101-107 (Lord Millett); para.117 (Lord Scott); paras.136-146 (Lord Rodger); *Ahmad and another v Government of the United States of America*, [2006] EWHC 2927 (Admin); *U.S. v Babar Ahmad*, (D.Conn., 6 October 2004)(Indictment); *Case of Barbar Ahmad and Others v The United Kingdom* (Applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09), Judgment, 10 April 2012 (and cases cited therein); *R v Abu Hamza*, [2006] EWCA Crim 2918; *Mustafa Kamel Mustafa (Otherwise Abu Hamza) v The Government of the United States of America for the Home Department*, [2008] EWHC 1357 (Admin); *U.S. v Mustafa Kamel Mustafa et al.*, S2 04 Cr.356 (JFK) (S.D.N.Y., 2006)(Indictment); *U.S. Mohammed Ali Al-Moayad, Mohammed Mohsen Zayad*, (2nd Cir., 2008); Press Release, U.S. Attorney for the Southern District of New York, ‘Swedish Citizen Oussama Kassir Found Guilty of Providing Material Support to Al-Qaeda’, 12 May 2009.

(b) to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.²⁴⁹

The term ‘State or government facility’ is defined in Article 1(1) as including:

any permanent or temporary facility or conveyance that is used or occupied by the representatives of a State, members of Government, the legislature or the judiciary or by officials of an intergovernmental organisation in connection with their official duties.²⁵⁰

Article 6(2)(b) of the convention establishes protective jurisdiction as a subsidiary ground where ‘the offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State’. The definition of ‘State or government facility’ is replicated in two further international conventions, on Financing and Nuclear Terrorism, and has also been incorporated into the draft comprehensive convention, each of which establish protective jurisdiction.²⁵¹ It is useful to note that, while the Bombings Convention, as with the three latter conventions, has as its aim the protection of the State’s facilities located abroad, it indirectly protects the State’s representatives, personnel and employees performing official duties as well as other nationals present within those facilities not performing official duties. The other notable aspect to the Bombings Convention is that it criminalises a range of inchoate and ancillary offences set forth in Article 2, which would be covered by protective jurisdiction where these are committed abroad against a State or government facility abroad, or where they are intended to be committed against a State or government facility, a public transportation system or an infrastructure facility in the State’s territory.

That the State’s property and personnel entitled to special protection constitute vital interests falling under protective jurisdiction is also supported by Security Council practice. The Security Council has been prepared to condemn and impose sanctions under the authority of Chapter VII in response to attacks on such interests.²⁵² The Security Council has also indicated that attacks committed against embassies constitute

²⁴⁹ *Supra* n 79, Article 2.

²⁵⁰ *Ibid.*, Article 1(1).

²⁵¹ Financing Convention, *supra* n 161, Article 7(2)(b); Nuclear Terrorism Convention, *supra* n 162, Articles 1(5) & 9(2)(b); draft comprehensive convention, *supra* n 163, Article 6(2)(d).

²⁵² E.g., S/RES/457 (4 December 1979); S/RES/1044 (10 January 1996).

an attack on the government of the sending State.²⁵³ In response to the bombing of U.S. embassies in Kenya and Tanzania in 1998, discussed above, the Security Council stated that it was ‘deeply disturbed’ by those attacks, which ‘jeopardise the security of States’.²⁵⁴ The Security Council also seemingly endorsed, or at least paved the way, for the use by the U.S. of protective jurisdiction in its adoption of resolution 1189, which ‘strongly condemn[ed]’ the ‘terrorist bomb attacks’ in Kenya and Tanzania and called on all States to ‘cooperate with and provide support and assistance to the ongoing investigations in Kenya, Tanzania and the United States to apprehend the perpetrators ... and to bring them swiftly to justice’.²⁵⁵ The Security Council has encouraged States and, to that end, imposed sanctions on the Taliban, to assist the U.S. in bringing the persons accused of the attacks to trial.²⁵⁶

5.6. Concluding Remarks

The purpose of this chapter has been to shed important light on the definition of protective jurisdiction in contemporary customary international law. One approach to defining this jurisdiction is to specify a narrow list of offences over which the principle is applicable. However, this approach is problematic in that it may be difficult, if not impossible, to harmonise national laws, in particular widely divergent definitions of ‘terrorism’. Defining protective jurisdiction in this way may also be overly rigid for responding to the complex and evolving nature of the threat posed by international terrorism.²⁵⁷ The present chapter has adopted an alternative approach and proposed that it may be possible to define protective jurisdiction by enumerating some of the vital interests that have been included under its ambit *lex lata* and around which a basic level of agreement appears to have clustered. It has done so by building upon the detailed empirical analysis of national laws, in chapter four and Annex A, as well as the use of a range of other primary sources, namely judicial practice, counter-terrorism treaties and Security Council resolutions. These latter sources verify that certain interests

²⁵³ U.N. Doc.S/23772 (2 April 1992); Mickolus, F.E. & Simmons, I.S. (1997). ‘Terrorism, 1992-1995. A Chronology of Events and a Selectively Annotated Bibliography’. USA: Greenwood, at p.148.

²⁵⁴ S/RES/1189, *supra* n 195, preambular para.2.

²⁵⁵ *Ibid.*, paras.1, 3.

²⁵⁶ See also the establishment by the Council of the Special Tribunal of Lebanon, which is authorised to exercise protective jurisdiction over the alleged offenders, in response to the assassination of the Lebanese Prime Minister, *supra* n 174; SC/10761-AFR/2440, *supra* n 102.

²⁵⁷ See further chapter six.

sufficiently qualify as ‘vital’ and indicate more clearly which of these interests are shared by the international community.

The chapter has also proposed *lex ferenda* that the protection of certain vital interests is sufficiently widespread and uniform in the practice of the international community of States that protective jurisdiction could be defined according to as a ‘shared vital State interests’ approach. The purpose of proposing this approach is twofold. First of all, it is to show that a core category of vital State interests is shared by the international community. The chapter has shown that 13 vital State interests have been included under the ambit of protective jurisdiction *lex lata*, 10 of which are shared by the international community. These are as follows: sovereignty; territorial integrity; political independence; constitution; security; Heads of State/government; personnel and property (including internationally protected persons and property); nationals; registered aircraft and vessels; and currency and official documents. The right to protect some of these interests from international terrorism by the use of extraterritorial jurisdiction, most notably the State’s sovereignty, political independence, nationals, international protected personnel and property and registered aircraft, has been sanctioned by the Security Council under Chapter VII. The Security Council has also used its Chapter VII powers in order to oblige States to extradite alleged offenders to those States whose vital interests have been implicated by an offence, or otherwise to prosecute the accused on their behalf.

These vital interests are by no means exhaustive. Nonetheless, these interests are some of the most important that are threatened by international terrorism and they go some way to explaining the behaviour of States in seeking to combat it. Of course, the nature and scale of the threat is relative and can differ considerably, depending on the State against which terrorist groups are fighting, but the vital interests enumerated above serve to illustrate a number of common themes. The enumeration of such interests could also facilitate the codification of protective jurisdiction as they are indicative of areas of the law on which there is a basic level of consensus and agreement. These shared vital interests therefore provide a useful basis on which the ILC may begin a more informed discussion on the codification of protective jurisdiction. The codification of protective jurisdiction by the ILC as a necessary and desirable way forward is examined in the final, concluding chapter.

The present chapter does not aim to be comprehensive and there may well be other vital interests that have been included under protective jurisdiction, in particular outside the context of international terrorism. A case in point is ‘governmental functions’, which has been defined by the Restatement (Third) as one of two all-encompassing vital interests falling under protective jurisdiction. The validity of governmental functions as a vital interest has been recognised and relied upon by U.S. courts, and the judgments in question have not received international protest. The State’s governmental functions may even form an inherent part of, or underlay, some of the other shared vital State interests, enumerated above, most notably sovereignty and political independence, nationals and personnel and property.²⁵⁸ Simma and Müller have suggested that protective jurisdiction is applicable over acts that jeopardise a State’s governmental functions, the reason being that such functions reflect one of the cardinal elements of the very concept of the State, namely government power.²⁵⁹ However, the authors *inter alia* cite no authority, by way of State practice, in support of the proposition that governmental functions are a vital interest. It is thus unclear whether governmental functions fall under protective jurisdiction *lex lata*, as a stand-alone vital interest, or need to be approached from the perspective of *lex ferenda*. This could be determined by States during the codification of protective jurisdiction.

The second reason for proposing a shared vital State interests approach in defining protective jurisdiction is to show that such interests are not to be confused and conflated with ‘international community values’. There is, as has been explained, a collective belief that the obligation to extradite or prosecute, a principle that has been used in more than sixty treaties, including counter-terrorism treaties, impliedly codifies a ground of universal jurisdiction for the protection of international community values. This interpretation of extradite or prosecute has been accepted uncritically, and often exaggerated, by courts and in legal scholarship, which have persistently either relied on tentative, secondary material, or cited primary materials, wholly out of context. As has been shown, this collective belief lacks sufficient rigour and provides for an overly simplistic and inaccurate description of the law. It is also based on a fundamental assumption, namely that the protection of international community values based on universal jurisdiction has traditionally developed as a customary rule in the case of

²⁵⁸ See *Bin Laden*, *supra* n 12, at p.221.

²⁵⁹ *Supra* n 95, at *ibid*.

piracy and war crimes and can simply be analogised with extradite or prosecute and expanded to encompass a broad range of other treaty crimes. These issues have been illustrated by analysing the recent decision of the ICJ in the case of *Habré*. The chapter has shown that the description of the obligation to extradite or prosecute in the CAT as ‘universal jurisdiction’ by the ICJ (which is modelled on the same obligation used in three-quarters of the multilateral treaties dealing with criminal matters that have been adopted since 1970, including counter-terrorism treaties) was merely *dictum*. The ICJ provided no analysis of extradite or prosecute or universal jurisdiction. The passing description of extradite or prosecute as universal jurisdiction, which is not supported by a close reading of the *trévoux préparatoires* of the CAT or a basic textual analysis of the instrument, hardly provides for a sufficiently rigorous and persuasive interpretation of the law. The debate on universal jurisdiction at the General Assembly and the effort made to codify extradite or prosecute by the ILC show that there is considerable disagreement on the meaning of ‘universal jurisdiction’ and its relationship with extradite or prosecute. It is thus premature to describe extradite or prosecute, as did the ICJ, as ‘universal jurisdiction’.

The chapter has proposed that extradite or prosecute in counter-terrorism treaties should not, on closer inspection, be automatically interpreted as the exclusive treaty codification of a customary rule of universal jurisdiction for the protection of international community values. In the first place, it does not explain with sufficient accuracy the complex and relative nature of the threat posed by international terrorism and the reason why States negotiate the adoption of treaties in order to combat it. Rather, the prescriptive jurisdiction arising out of extradite or prosecute is equally capable of being interpreted as a form of ‘treaty-based’ protective jurisdiction. The reason why extraterritorial jurisdiction arising out of this principle does not explicitly require a prescriptive connection between a legislating State and an alleged offence committed abroad to be established is necessary in order for States parties to implement the obligation to extradite or prosecute, the purpose of which is more effectively to protect certain of their own vital interests. A number of these vital State interests are shared by the international community, discussed above. Thus, the State in whose custody the accused is present is obliged, failing extradition to the party that has a connection with the alleged offence, to initiate criminal proceedings on the latter’s behalf. This prescriptive jurisdiction is also sufficiently broad to encompass offences

that implicate a party's vital interests which either do not, or cannot be evidenced, to fall within one of the more narrowly defined circumstances permitting extraterritorial jurisdiction as specified by the relevant treaty. In the latter case, all that has to be established by the legislating State is the presence of the accused on its territory. This means that States do not have to make any reference to, or provide any evidence of, their vital interests that may be threatened or implicated by an alleged offence. In sum, States parties to the relevant treaties concerned are able to use this mutually beneficial treaty-based jurisdiction in order to protect, or have protected on their behalf by other parties, their own vital interests.

At a conceptual level, the description of extradite or prosecute as universal jurisdiction confuses the protection of 'shared vital State interests' with the protection of 'international community values'. Extradite or prosecute and universal jurisdiction are both instrumental in combating the impunity of perpetrators of serious crimes. However, they are conceptually distinct and have different aims - and are capable of protecting different values and interests - in preventing impunity. The reason why States use the obligation to extradite or prosecute in counter-terrorism treaties, in order to prevent impunity, is fundamentally different to universal jurisdiction: treaty offences have a connection with certain vital State interests shared by the parties. These vital State interests are evidenced by the operative provisions of the relevant treaties and the way in which they have been implemented. This is not to suggest, however, that the prevention of impunity under extradite or prosecute may not also contribute in some way, perhaps indirectly or incidentally, to the protection of international community values. However, whatever the extent to which extradite or prosecute may protect such values does not transform this mutually beneficial treaty-based protective jurisdiction into a ground of universal jurisdiction. It is also unclear, other than the prevention of impunity of perpetrators of certain serious crimes, what these values are agreed to comprise, or, for that matter, whether they correspond with the values which may be protected by universal jurisdiction under customary international law. The reason for this is twofold. First of all, it is not possible to deduce international community values from the operative provisions of treaties. Secondly, the international community values that may be protected by the customary rule of universal jurisdiction are, *a priori*, equally unclear and are, more often than not, left insufficiently explained or unsubstantiated by courts and in legal scholarship. There is thus a fundamental

conceptual distinction that needs to be made, for the purpose of distinguishing more clearly the grounds of protective and universal jurisdiction, between the protection of 'shared vital State interests' and 'international community values'.

Chapter Six

‘Codification of Protective Jurisdiction by the International Law Commission as a Way Forward: Problems and Prospects?’

6.1. Introduction

As concluding remarks have been made at the end of each chapter, the focus of this concluding chapter is the codification of protective jurisdiction by the International Law Commission (ILC) as a potential way forward. The adoption of an instrument codifying protective jurisdiction is not only timely but also a ‘necessary and desirable’ endeavour.¹ This is so for two important reasons. The first of these is that, within a criminal law paradigm, protective jurisdiction is the principal means by which States combat the complex and evolving threat of international terrorism. State practice, as was shown from a detailed empirical analysis in chapter four, may be sufficiently widespread to permit codification. Chapter five has also enumerated 13 vital State interests, 10 of which are shared by the international community, that have been included under protective jurisdiction *lex lata*. These vital interests are by no means exhaustive. Nonetheless, they go some way to explaining the reason why international terrorism is regarded as a serious threat and the type of interests that the international community of States seeks to protect in order to combat it. The codification of protective jurisdiction, as will be explained below, could potentially contribute to, and fill in the gaps left by, the existing international legal framework for combatting international terrorism. This is important in view of the determination by the U.N. Security Council that international terrorism is not only ‘one of the most serious threats to international peace and security’ but it is also one that is increasingly ‘diffuse’ and ‘growing’.² Secondly, the ILC has recently included the topic of ‘Extraterritorial jurisdiction’, with a view to the codification of protective jurisdiction, in its long-term programme of work.³ The ILC has also recognised that protective jurisdiction may be of particular relevance for combatting international terrorism. The most pressing question thus turns not on whether codification is the most appropriate way forward but, rather, the range and scope of issues for consideration by the ILC and the outcome that such codification will eventually take.

¹ ILC Statute, 1947, in A/RES/174(II) (21 November 1947), Article 18(2).

² S/RES/2178 (24 September 2014), preambular paras.2-3.

³ *Infra* n 40.

The chapter concludes that, owing to the complex and politically sensitive nature of the topic and in view of the codification of similar topics touching on important State interests by the ILC, the final outcome of codification may be rather modest and could take a number of years, and perhaps even decades, to achieve.

The chapter begins, in part two, by examining what can be learned from previous codification efforts before turning to examine, in part three, the decision of the ILC to include 'Extraterritorial jurisdiction' in its long-term programme of work. Part four assesses the draft prepared by the ILC Secretariat, upon which the ILC endorsed the inclusion of this topic in its long-term programme of work. As will be explained, the draft is to be welcomed, not least for highlighting that State practice is sufficiently uniform to permit codification and that protective jurisdiction may be of particular relevance for combatting new types of transnational crimes, including acts of terrorism. The draft also alludes to the need to examine vital interests in responding to international terrorism.

On the other hand, the draft is subject to a number of shortcomings. One of the most important of these is that, contrary to the proposal by the draft, it is not helpful for the ILC to codify protective jurisdiction in isolation from other grounds of jurisdiction, most notably the theory of universal jurisdiction, or to break the law up into separate specialist fields. The reason for this is twofold. The first of these is the unity of international law as a legal system. Secondly, the draft, by assuming that protective jurisdiction has no relevance to international crimes and crimes contained in special regimes, appears to inadvertently entrench the jurisdictional dichotomy over domestic and international crimes. One of the main causes of this dichotomy, it will be recalled from chapter three, is that the ILC, since its First Session in 1949, has followed the same fragmented approach to codification as did the League of Nations and Harvard Research. The upshot of this approach is that the development and applicability of protective jurisdiction over piracy and war crimes has been given insufficient consideration by courts and in legal scholarship. The development of jurisdiction over these crimes for the protection of 'shared vital State interests' has also been misinterpreted as the protection of 'international community values' based on a theory of universal jurisdiction. It is on the basis of these special regimes that unilateral attempts have been made in recent years to expand universal jurisdiction to include

crimes outside these regimes, most notably offences falling in the treaty regime governing the obligation to extradite or prosecute and in general international law. These conflicting interpretations of the law are challenging the coherence of the international legal system.

The chapter discusses, respectively in parts five and six, the principal advantages and disadvantages to codification that could be taken into consideration by the ILC. One of the most important advantages is that such an instrument could enumerate some of the shared vital State interests that fall under protective jurisdiction *lex lata*. As there is no legally binding definition of ‘terrorism’ in international law, it could also be used to enhance coherence and uniformity in the adoption of national laws, particularly in the implementation of Security Council resolutions, and strengthen the *ad hoc* regime of counter-terrorism treaties. The latter approach, as will be explained, is not entirely satisfactory for responding to the complex and evolving threat of international terrorism in all its forms and manifestations. The principal disadvantages, of which there are two, turn on the fact that agreement on protective jurisdiction would have to be in the abstract, and the difficulty of attaining consensus on the type of vital interests that may be protected. That said, neither of these disadvantages, in and of themselves, are sufficient to prevent codification.

6.2. Previous Efforts to Codify Protective Jurisdiction

The codification of protective jurisdiction, it will be recalled from chapter three, is not new and has historical precedents. It is useful to summarise what can be learned from these previous efforts, as well as the more recent decision by the ILC to include the topic of ‘Extraterritorial jurisdiction’ in its long-term programme of work, before proceeding to discuss the principal advantages and disadvantages of codification by the ILC.

6.2.1. League of Nations

The first public effort to codify protective jurisdiction was made by the League of Nations.⁴ The League's Committee of Experts ultimately decided that codification, 'although desirable, would encounter grave political and other obstacles'.⁵ The reason the Committee of Experts decided not to include protective jurisdiction in its list of topics as being 'ripe' for codification 'at the present moment' is because the League had limited itself to the selection of topics that could be codified by way of binding international conventions and was based on the recommendation by Brierly, acting as Rapporteur.⁶ According to Brierly, the U.S. and Britain opposed any exception to the territoriality of jurisdiction and therefore the possibility of any agreement would 'demand sacrifices'.⁷ The report by Brierly, as has already been explained in chapter three, was not based on research of primary sources and there was little primary analysis either; and, as with other Anglo-American jurists at that time, Brierly advocated a strict territorial approach to jurisdiction in international law, at least in respect of offences committed in the State's territorial sovereignty. Brierly's report showed, *a contrario*, that protective jurisdiction was widely used in State practice, a view that was confirmed by the observations of De Visscher, assisting Brierly.⁸ In any case, protective jurisdiction had, in fact, developed in the practice of Britain and the U.S., most notably over piracy on the high seas, though this was summarily dismissed by Brierly as having no relevance to the topic under consideration, as piracy occurred outside territorial sovereignty. Brierly's recommendation *inter alia* thus appears to have been unfounded.

One of the wider implications raised by the League's decision *inter alia* is that the topic was not communicated to governments for their 'opinion' or deliberated at the 1930 Hague Conference for the Codification of International Law.⁹ There was thus no opportunity for States to deliberate and exchange views on the nature, development and scope of protective jurisdiction, specifically, or its relationship with other grounds of jurisdiction, more generally, under customary international law.

⁴ Brierly, J.L. & De Visscher, C., Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, 'Jurisdiction over Extraterritorial Crime'. 20 *AJIL (Spec. Supp.)*(1926) 252.

⁵ *Ibid.*, at p.253.

⁶ *Ibid.*

⁷ *Ibid.*, at p.258.

⁸ *Ibid.*, at pp.258-259.

⁹ Documents from the League of Nations Committee of Experts for the Progressive Codification of International Law. 26 *AJIL (Spec. Supp.)*(1926) 1, at pp.12-20.

6.2.2. Harvard Research

The League's codification effort prompted the Harvard Research to produce a Draft Convention on the topic, in the hope that it would be of interest to, and merit the attention of, the League.¹⁰ The Harvard Research adopted the same approach as the League and limited itself to the codification of this topic in such a way that it could be adopted by means of an international convention. The Harvard Research, despite being a private codification effort, was the first study to systematise and codify theories relating to grounds of jurisdiction under customary international law, as well as use the nomenclature 'protective principle' and provide a definition of it. The Harvard Research examined State practice and found evidence of a 'high degree of uniformity' and 'almost universal approval' of protective jurisdiction in national laws and, based on this practice, defined such jurisdiction as being applicable to any crime committed against the State's 'security, territorial integrity or political independence'.¹¹

However, the Harvard Research followed the same approach as Brierly and gave no consideration to protective jurisdiction over 'piracy' on the high seas and, instead, dealt with the latter topic under a wholly separate draft article. More importantly, the Harvard Research went one step further and proposed *lex ferenda* a theory of 'universality' of jurisdiction over a crime of piracy under international law.¹² The Harvard Research, as has already been explained in chapter three, misinterpreted the right of every State to exercise jurisdiction over so-called 'pirates' on the high seas for the protection of their sovereignty and certain of their vital interests, which were shared by the international community, or at least by the maritime powers, and called it 'universal jurisdiction' by a different name.

This misinterpretation by the Harvard Research was due, it will be recalled, to an overreliance on tentative, secondary sources, in particular the commentaries of Anglo-American jurists and, most notably, the academic commentary of J.B. Moore, who later repeated his view in a Dissenting Opinion while serving as the first U.S. judge before

¹⁰ Research on International Law under the Auspices of the Harvard Law School, Part II, 'Jurisdiction with Respect to Crime'. 29 *AJIL (Supp.)*(1935) 435 (Harvard Research).

¹¹ *Ibid.*, at pp.446-447, 543, 546, 549, 551, 557.

¹² *Ibid.*, at p.563 (Article 9 and commentary).

the Permanent Court of International Justice in the *Lotus* case.¹³ The reason why Moore defined ‘piracy’ as a crime under international law, and interpreted jurisdiction over it as a theory of ‘universal jurisdiction’, was due to an effort by Moore to distinguish between extraterritorial jurisdiction over piracy on the high seas, which had undeniably developed in the practice of Britain and the U.S., from extraterritorial jurisdiction in general international law in respect of crimes occurring in the State’s territorial sovereignty. The opinion of Moore, which was typical of Anglo-American jurists at the time, was a strict territorial approach to jurisdiction in international law; thus, jurisdiction over piracy on the high seas, for Moore, provided the only exception to territoriality solely on the basis that it had as its purpose the protection of international community values. The opinion of Moore and the Harvard Research were not based on State practice. It should thus be of little surprise, perhaps, that they were unable to explain what international community values were protected by universal jurisdiction, or provide any empirical evidence of the protection of such values.

6.2.3. First Session of the ILC

The way in which the League and the Harvard Research approached the codification of jurisdiction was relied upon by, and had important implications for, the codification effort by the ILC at its First Session, in 1949. The ILC, based on a memorandum submitted by the U.N. Secretary-General, identified the topic of ‘Jurisdiction with regard to crimes committed outside national territory’ as one of fourteen areas of international law that were ‘necessary and desirable’ for codification.¹⁴ The preparatory work by the Secretary-General was not based on an examination of State practice; rather, it reviewed the previous codification efforts by the League and the Harvard Research, the latter of which the Secretary-General regarded as being ‘of great value’.¹⁵ On the one hand, the Secretary-General observed that the topic of extraterritorial jurisdiction is ‘of considerable practical importance’ and ‘by general admission requires clarification and authoritative solution’, not least because protective jurisdiction is of a ‘controversial nature’ and is ‘not free from difficulty’.¹⁶ On the other, the Secretary-General appeared to adopt the opinion of Brierly, above, namely that objective

¹³ Moore, J.B. (1906). ‘Digest of International Law’, vol. II, at pp.951-952; *Case of the S.S. “Lotus” (France v Turkey)*, Judgment, PCIJ Reports 1927, Series A. No.10, at p.70 (Diss. Op. Judge Moore).

¹⁴ U.N. Doc.A/GN.4/1/Rev.1 (10 February 1949) (Memorandum); ILCYB, 1949, vol.I, at pp.280-281.

¹⁵ (Memorandum), *ibid.*, at p.37.

¹⁶ *Ibid.*

territorial jurisdiction provides an alternative to extraterritorial jurisdiction. Thus, the Secretary-General suggested that, in dealing with this topic, the ILC may wish to ‘attach importance’ to the doctrine of territoriality and argued that, in any scheme of codification, protective jurisdiction is of ‘limited compass’ and should ‘figure merely as a subdivision of a larger topic such as “Obligations and Limitations of Territorial Jurisdiction”’.¹⁷

It is fair to say that the opinion of the Secretary-General *inter alia*, even if it was accurate at that time, certainly does not reflect accurately the contemporary situation and the important developments that have subsequently occurred in respect of transnational crime, most notably, the complex threat of international terrorism, and the trends in State and treaty practice to establish extraterritorial jurisdiction in order to combat it. Given that the preparatory work by the Secretary-General was limited almost exclusively to a review of the codification efforts by the League and the Harvard Research, it should, perhaps, be of little surprise that no consideration was given to the applicability of protective jurisdiction over piracy on the high seas, which was treated by the Secretary-General under a separate topic of ‘The Regime of the High Seas’.¹⁸ Nor did the Secretary-General give any consideration to the development of this jurisdiction in widespread State practice over war crimes in the aftermath of World War II.

The ILC ultimately decided, perhaps in light of the Secretary-General’s remarks, to give priority to the formulation of a ‘draft Declaration on the Rights and Duties of States’¹⁹ and the codification of other topics, most notably ‘The Regime of the High Seas’.²⁰ In the codification of the latter topic, the Rapporteur and the ILC relied exclusively, and without question, on the Harvard Research in the codification of the 1958 Geneva Convention on the High Seas; and neither of them examined or gave any consideration to the development of jurisdiction over piracy in State practice. Nor were they prepared to explain grounds of jurisdiction under custom and which of these grounds, if any, was codified by the convention in respect of piracy, or the interests or values that States are supposed to protect in the suppression of piracy. The ILC also considered, at its First

¹⁷ *Ibid.* See also U.N. Doc.A/CN.4/2 (15 December 1948), at pp.70-71.

¹⁸ *Ibid.*, at pp.8, 40-42.

¹⁹ A/RES/178(II) (21 November 1947); A/RES/375(IV) (6 December 1949); A/RES/596(VI) (1951).

²⁰ ILCYB, *supra* n 14, at p.281.

Session, whether the ‘laws of war’ and the punishment of war crimes should be selected as a topic for codification but the majority of the ILC declared itself opposed to the study of this topic at that time.²¹

The upshot of all this is that grounds of jurisdiction under customary international law and protective jurisdiction in particular have not previously been codified by the ILC, let alone debated and the views of governments exchanged. Nor has the development and applicability of protective jurisdiction over piracy and war crimes been given any consideration by the ILC.

The first codification effort by the ILC raises broader implications of great importance for the present study. The first of these is that the way in which the ILC approached the codification of jurisdiction was fragmented: the ILC decided not to codify grounds of jurisdiction, on the one hand, and prioritised the codification of jurisdiction contained in the special legal regime governing piracy on the high seas, on the other. At the same time, the ILC decided not to codify the applicable grounds of jurisdiction in the special regime governing the laws of war. The obligation to extradite or prosecute in respect of war crimes amounting to grave breaches was codified in the four Geneva Conventions and adopted at the Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims in 1949.²² The Diplomatic Conference worked on the basis of draft texts adopted by the Seventeenth International Red Cross Conference.²³ However, at no point were grounds of jurisdiction over such crimes examined by the International Red Cross Conference or the Diplomatic Conference. This fragmented approach to codification had the effect of formally entrenching the jurisdictional dichotomy over international and domestic crimes - first developed by Moore and subsequently adopted by the League and, thereafter, codified by the Harvard Research; that is, extraterritorial jurisdiction over piracy on the high seas is, to borrow the words of the Secretary-General, above, ‘isolated and disconnected’ to the question of ‘[protective] jurisdiction over aliens for crimes committed abroad’ under the topic of

²¹ *Ibid.*

²² Final Record of the Diplomatic Conference of Geneva of 1949, available online: www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html.

²³ Report of the Seventeenth International Red Cross Conference, Stockholm, August 1948, available online: www.loc.gov/rr/frd/Military_Law/pdf/RC_XVIIth-RC-Conference.pdf.

‘Jurisdiction with regard to crimes committed outside national territory’.²⁴ This dichotomy has subsequently resulted in the development and applicability of protective jurisdiction over piracy and war crimes to be given insufficient consideration by courts and in legal scholarship. Rather, protective jurisdiction is perceived, in the words of the Secretary-General, to be of a ‘controversial nature’ and limited to domestic crimes for the protection of a narrow category of State interests.

Secondly, the priority given by the ILC to the codification of jurisdiction over piracy and, to that end, the reliance placed on the Harvard Research, has given rise to the collective belief, to which reference has already been made in chapters three and five. This collective belief has developed out of haphazard analyses of State practice and the overreliance on tentative, secondary sources of evidence of customary international law. It posits that universal jurisdiction has, for the past 500 years, developed over an international crime of piracy as a customary rule in order to protect international community values and that this ground of jurisdiction has been codified by the ILC. Moreover, the protection of such values on the basis of universal jurisdiction expanded in the aftermath of World War II from piracy to encompass war crimes and other crimes under international law; and, since the adoption of the 1949 Geneva Conventions, universal jurisdiction has been implicitly codified in more than 60 treaties that use the obligation to extradite or prosecute, including counter-terrorism treaties. This collective belief is best illustrated, perhaps, by the successor of the Harvard Research and the only other private codification of jurisdiction, the American Law Institute in its Restatement of the law.²⁵ As has already been explained in chapters three and five, this collective belief misinterprets jurisdiction for the protection of shared vital State interests as a theory of universal jurisdiction. It is worth noting, by way of aside, that this collective belief provides a useful example of the reason why the ILC decided in 2012 to include in its programme of work the topic of the ‘Formation and evidence of customary international law’ - with the aim of restraining haphazard analyses of the formation and sources of evidence of custom.²⁶

²⁴ Memorandum, *supra* n 14, para.104.

²⁵ Restatement of Foreign Relations Law of the U.S. (Second), Washington, D.C. (1965), para.34; Restatement of Foreign Relations Law of the U.S. (Third), Washington, D.C. (1987), para.404.

²⁶ U.N. Doc.A/CN.4/653 (30 May 2012), para.22. The title of this topic was subsequently changed to ‘Identification of customary international law’, U.N. Doc.A/68/10 (2013), para.65; U.N. Doc.A/CN.4/661 (4 April 2013), at p.4.

6.3. The Inclusion of ‘Extraterritorial jurisdiction’ in the ILC’s ‘Long-term Programme of Work’

The ILC, having first identified ‘Jurisdiction with regard to crimes committed outside national territory’ as a topic in urgent need of codification in 1949, did not return to this topic for more than forty years. The ILC, at its Forty-Fourth Session, in 1992, embarked upon a more rigorous procedure for the selection of topics in international law for codification and, to that end, established a Working Group to consider a limited number of topics to be recommended to the General Assembly for inclusion in its long-term programme of work.²⁷ The Working Group provisionally identified 12 topics as possible subjects of later work and individual members of the ILC were asked to write a short synopsis outlining the nature of the topic, the subject-matter to be covered and the extent to which the topic was already dealt with in treaties and private codification projects. One such topic proposed for the consideration of the Working Group, prepared by Mr. P.S. Rao, was entitled ‘Extraterritorial application of national legislation’.²⁸

The report prepared by Rao, in outlining this topic as suitable for future work by the ILC, was primarily based on secondary sources, rather than analysis of State practice. It suggested that national laws are given extraterritorial application in different contexts, one of which is ‘[t]o protect a State against treason, terrorism, drug trafficking and other offences affecting its power and security’.²⁹ The exercise of extraterritorial jurisdiction is also ‘inevitable and even desirable’, the reasons for which include the interdependence of the international community which necessitates the extension of the State’s jurisdiction beyond its borders to regulate transnational activities which are of concern to the State; the desirability to avoid safe havens for criminals; and the imperatives of international cooperation to give full effect to treaty obligations.³⁰ Rao suggested that some of the issues which have acquired prominence and require a comprehensive and conceptual response are the concern by States to control terrorism and drug-trafficking and the need for States to seek security, independence and enjoy their sovereignty.³¹

²⁷ ILCYB, 1992, vol.II (Part Two), para.368; ILCYB, 1996, vol.II (Part Two), para.164.

²⁸ ILCYB, 1993, vol.II (Part One), at pp.237-242.

²⁹ *Ibid.*, at p.237.

³⁰ *Ibid.*, at pp.237-238.

³¹ *Ibid.*, at p.241.

Rao did not refer to the ‘protective principle’ or undertake any analysis of it. That said, Rao did not analyse other grounds of jurisdiction either. The reason for this may be because Rao took the view that, while all national legislation is *prima facie* territorial in character, there are ‘no uniform or universally settled principles’ regarding the extraterritorial application of national laws, which is essentially left to courts to determine in individual cases.³² It is notable, however, that Rao interpreted jurisdiction over acts of terrorism committed against the State’s nationals as a theory of passive personality jurisdiction.³³ On closer examination, and contrary to the opinion of Rao, jurisdiction *inter alia* is more persuasively based on the protective principle.³⁴ On a policy level, one of the issues that arises, suggested Rao, is ‘[w]hat should be the limits for exercise of jurisdiction on the basis of the principles of “effects”, “passive personality”, or “active personality”?’.³⁵ Rao thus suggested that the ‘various principles’ of extraterritorial jurisdiction - ‘the principle of universality, the principles of active and passive nationality and the principle of effect’ - therefore need to be analysed and consolidated.³⁶ A study on the topic of extraterritorial jurisdiction by the ILC, for these and other reasons, suggested Rao, is thus ‘important and timely’.³⁷ The proposed study of jurisdictional principles by Rao did not presuppose the existence of a jurisdictional dichotomy, discussed above.

Notwithstanding the report by Rao, the topic of jurisdiction was not returned to by the ILC until 1996. The ILC, during its Forty-Eighth Session, established a non-exhaustive list of topics classified under 13 main fields of public international law for future study as part of its long-term programme of work.³⁸ Of the various topics listed by the ILC, three of these were identified as ‘appropriate for codification and progressive development’ in the future work of the ILC, while numerous others, including the topic of ‘Extraterritorial jurisdiction’, were identified by the ILC as ‘possible future topics’.³⁹ The reason for the ILC’s decision *inter alia* was more a matter of capacity and not

³² *Ibid.*, at p.239.

³³ *Ibid.*, at p.237 & n 4.

³⁴ Chapter five.

³⁵ *Supra* n 26, at pp.238-239.

³⁶ *Ibid.*, at p.241.

³⁷ *Ibid.*, at p.242.

³⁸ ILCYB, 1996, vol.II (Part Two), Annex II.

³⁹ *Ibid.*, at pp.97, 134.

because the ILC regarded ‘Extraterritorial jurisdiction’ as inappropriate or undesirable for codification and progressive development at that time.⁴⁰

The ILC’s Planning Group established, during the Fifty-Fourth Session of the ILC, in 2002, a ‘Working Group on the Long-term Programme of Work’. The Working Group submitted its report to the Planning Group at the Fifty-Eighth Session of the ILC, in 2006. The report *inter alia* considered a number of topics for inclusion in the ILC’s long-term programme of work, one of which was ‘Extraterritorial jurisdiction’. The Working Group, in the selection of topics, was guided by the criteria set out in the recommendation by the ILC:

- (a) The topic should reflect the needs of the States in respect of the progressive development and codification of international law; (b) The topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; [and] (c) The topic is concrete and feasible for progressive development.⁴¹

The Working Group requested the ILC Secretariat to prepare a draft on the topic of ‘Extraterritorial jurisdiction’. In the light of the Secretariat’s draft, the Planning Group recommended, and the ILC endorsed, the inclusion of the topic of ‘Extraterritorial jurisdiction’ in its long-term programme of work at the Fifty-Eighth Session.⁴² The topic has, however, not yet been placed on the ILC’s programme of work. Nonetheless, this development is noteworthy given that, until this point, extraterritorial jurisdiction was one of only four topics out of the list of fourteen originally agreed to by the ILC in 1949 on which the ILC has not submitted a final report to the General Assembly.⁴³ It is useful, therefore, to examine the Secretariat’s draft.

6.4. Draft on ‘Extraterritorial jurisdiction’ by the ILC’s Secretariat

The draft on ‘Extraterritorial jurisdiction’ produced by the ILC Secretariat stated that, while jurisdiction has traditionally been limited to the State’s territory, today extraterritorial jurisdiction ‘has become an increasingly common phenomenon’, one of the consequences of which is due to increasing transnational criminal activities,

⁴⁰ *Ibid.*, paras.246-247.

⁴¹ ILCYB 1997, vol.II (Part Two), at pp.71-72, para.238.

⁴² U.N. Doc.A/61/10 (2006), Chapter XIII, paras.257, 260; *ibid.*, ‘Extraterritorial jurisdiction’, Annex E (ILC Secretariat); A/RES/ 61/34 (18 December 2006), para.7.

⁴³ The three other topics are ‘Recognition of States and Governments’; ‘Treatment of aliens’; and ‘Right of asylum’; available online: www.legal.un.org/ilc/ilcintro.htm.

including drug trafficking and international terrorism.⁴⁴ The draft took the view that '[t]he topic "Extraterritorial jurisdiction" is in an advanced stage in terms of State practice, and is concrete.'⁴⁵ The draft noted that 'some may question whether the practice is sufficiently uniform or widespread to support a codification effort at this time'; however, it suggested that 'recent developments indicate that practice may be converging towards a more uniform view of the law' and there appears to be a 'strong need for codification in this field'.⁴⁶ The innovations in communications and transportation, moreover, 'make the codification and progressive development of the limits of the extraterritorial jurisdiction of States a timely and important endeavour'.⁴⁷

As regards grounds of jurisdiction, the draft stated that the territoriality principle is the primary basis for jurisdiction, while jurisdiction based on 'principles such as the passive personality principle, the protective principle and the effects doctrine, has been more controversial'.⁴⁸ It proceeded to suggest, however, that State practice is indicative of 'a general tendency to broaden the classical bases for criminal jurisdiction in relation to specific types of crimes committed abroad, which have a particularly international scope and effect, such as terrorism, cyber crime and drug offences'.⁴⁹ Notably, the draft suggested that protective jurisdiction 'may be of particular relevance to new types of cyber crimes and terrorist offences'.⁵⁰ In that regard, the draft suggested that 'some States have broadened their interpretation of the concept of "vital interests" in order to address terrorism [...] and introduced the protective principle in their legislation and applied it in some court cases'.⁵¹

The draft suggested that an instrument 'could aim at setting forth general principles and more specific rules governing the assertion of extraterritorial jurisdiction under public international law' and that 'there is a considerable amount of State practice relating to the assertion of extraterritorial jurisdiction which the Commission could draw upon in the elaboration of such an instrument'.⁵² It also suggested that the elaboration of such an

⁴⁴ ILC Secretariat, *supra* n 42, para. 1.

⁴⁵ *Ibid.*, para. 3.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, para. 18.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, para. 20.

⁵¹ *Ibid.*

⁵² *Ibid.*, para. 33.

instrument, in addition to codification, may require some ‘progressive development of the law’ due to ‘the increasing level of disagreement and uncertainty with respect to certain aspects of the law governing jurisdiction’.⁵³ In that connection, the draft suggested that there are ‘several strong trends’ in State practice which may guide the ILC ‘in resolving the areas of disagreement and thereby provide greater clarity and certainty in an area of international law which is of increasing practical importance’.⁵⁴

There is little doubt, based on the Secretariat’s draft and the decision by the ILC to include the topic of ‘Extraterritorial jurisdiction’ in its long-term programme of work, that the codification of grounds of jurisdiction and the protective principle in particular is ‘necessary and desirable’.⁵⁵ The draft is to be welcomed for highlighting the ‘strong need’ to codify extraterritorial jurisdiction; this is so not only to provide for ‘greater clarity and certainty in an area of international law which is of increasing practical importance’, but also for alluding to the trend in State practice to use extraterritorial jurisdiction and the relevance of protective jurisdiction for combatting emerging transnational crimes, in particular international terrorism. The most pressing question, then, is not whether the codification of protective jurisdiction is an appropriate way forward but, rather, the range and scope of issues for consideration by the ILC and the form that such codification will eventually take. In that connection, the Secretariat’s draft is subject to a number of shortcomings.

The draft did not give any consideration to the contextual and historical development of protective jurisdiction in State practice, most notably in respect of piracy and war crimes. It merely intimated, instead, that jurisdiction based on this principle has been ‘controversial’ in the past.⁵⁶ Yet the draft did not explain the reason why this was so. It also stated that protective jurisdiction ‘may be viewed as a specific application of the objective territoriality principle or the effects doctrine.’⁵⁷ The draft thus misconceptualises protective jurisdiction in the same way as the ALI in its Restatement of the law.⁵⁸ The draft also appears to have misinterpreted, as does the Restatement, the theories of protection and passive personality jurisdiction over acts of terrorism which

⁵³ *Ibid.*, para.34.

⁵⁴ *Ibid.*

⁵⁵ *Supra* n 1.

⁵⁶ *Supra* n 42, para.18.

⁵⁷ *Ibid.*, para.13.

⁵⁸ Chapter five.

injure the State's nationals. To be sure, the draft suggested that passive personality has gained 'greater acceptance' in State practice in recent years and in this regard international terrorism is a 'paradigmatic' example.⁵⁹ The evidence relied upon by the draft in support of this proposition is the Joint Separate Opinion of Judges Higgins *et al.* in the *Arrest Warrant* and two counter-terrorism treaties.⁶⁰ However, the opinion of Judges Higgins *et al.* relied primarily on the Restatement (Third), the drafters of which, as has already been discussed in chapter five, misinterpreted the theories of protection and passive personality.⁶¹ The same point applies *mutatis mutandis* to the counter-terrorism treaties cited by the draft.⁶²

A similar issue arises in respect of the draft's treatment of universal jurisdiction. The draft did not examine universal jurisdiction and merely suggested that such jurisdiction applies with respect to international crimes and is exercised by the State 'in the interest of the international community rather than exclusively in its own national interest, and thus, this principle of jurisdiction would fall outside of the scope of the present topic.'⁶³ It is notable, in this regard, that the draft proposed a fragmented approach to codification and excluded the study of extraterritorial jurisdiction in special legal regimes, including the law of the sea and international humanitarian law.⁶⁴ The draft is thus based on the same assumption as the collective belief, discussed above; that is, only the theory of universal jurisdiction has traditionally developed over and remains applicable to international crimes, including piracy and war crimes, and that such crimes are suppressed to protect exclusively international community values, while grounds of extraterritorial jurisdiction other than universality, including protective jurisdiction, are limited to offences defined by 'national law applied extraterritorially'.⁶⁵

There is a strong case for proposing that it is neither in accordance with principle, nor helpful, for the purpose of codifying the topic of jurisdiction, for the ILC to codify protective jurisdiction in isolation from other grounds of jurisdiction, most notably the

⁵⁹ *Supra* n 42, paras.10, 15, 19.

⁶⁰ *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, Judgment, I.C.J. Reports 2002, p.3, para.47; Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963, 704 U.N.T.S. 219, Article 4; the International Convention against the Taking of Hostages, 1316 U.N.T.S. 205, Article 5.

⁶¹ Third Restatement, *supra* n 25, para.402.

⁶² Chapter five.

⁶³ *Supra* n 42, para.16.

⁶⁴ *Ibid.*, para.36.

⁶⁵ *Ibid.*, para.35.

theory of universal jurisdiction, or to break the law up into separate specialist fields. The reason for this proposal, first of all, is the unity of international law as a legal system.⁶⁶ Thus, the need for a unified approach to codification has recently been proposed by the Special Rapporteurs in the codification of other topics.⁶⁷

The second reason is that the Secretariat's draft, by assuming that protective jurisdiction has no relevance to international crimes, appears to inadvertently entrench the jurisdictional dichotomy, discussed above, between universal jurisdiction over piracy and international crimes, on the one hand, and the applicability of all other grounds of jurisdiction over domestic crimes, on the other. One of the main causes of this dichotomy, it will be recalled, is that the approach to codification by the League and continued by the ILC, since its First Session, has been fragmented. Such fragmentation does not necessarily challenge the coherence of the international legal system. However, the fact that grounds of jurisdiction have not been given any substantive consideration by the ILC has led to unilateral interpretations by some States, courts and in legal scholarship of the special legal regimes governing piracy and war crimes, both of which have been partially codified, as encompassing a theory of universal jurisdiction.

It is on the basis of these special regimes that unilateral attempts have been made by some States in recent years to expand the theory of universal jurisdiction to include other crimes outside these regimes, most notably offences falling in the treaty regime governing the obligation to extradite or prosecute and in general international law. These conflicting interpretations of the law, which are challenging the coherence of the international legal system, have led to the topic of universal jurisdiction being the subject of heated debate at the General Assembly and its Sixth Committee.⁶⁸ That debate, which has been on-going since 2009, is the first time that a particular ground of jurisdiction has received some exchange of views by governments at the international level and shows the importance of scrutinising long-standing, untested assumptions. It has also started to reveal some of the confusion and fundamental disagreement among States on the concept, scope and application of universal jurisdiction and its relationship

⁶⁶ U.N. Doc.A/61/10 (2006), *supra* n 42, para.251(1); U.N. Doc.A/CN.4/653, *supra* n 26; U.N. Doc.A/CN.4/661, *supra* n 26.

⁶⁷ *Ibid.*

⁶⁸ A/RES/64/117 (16 December 2009); U.N. Doc.A/65/181 (29 July 2010); Sixth Committee, U.N. Doc.A/C.6/65/SR.10 (3 November 2010), para.60.

with other grounds of jurisdiction and the regime governing the extradite or prosecute principle in international law.⁶⁹ Nonetheless, this debate has taken place in isolation, without any consideration of extraterritorial jurisdiction generally and of the applicability of protective jurisdiction over international crimes in particular. At the same time, the ILC, since it first included ‘The obligation to extradite or prosecute’ in its programme of work in 2005, has studied this topic in isolation from grounds of extraterritorial jurisdiction, other than universality.⁷⁰

The time is ripe for the ILC to clarify grounds of jurisdiction, which means assessing the applicability of protective jurisdiction over international crimes and crimes in special legal regimes, as well as its relationship with prescriptive jurisdiction arising out of the extradite or prosecute principle. Indeed, the Secretariat’s draft *inter alia* suggested that ‘[d]efining the main concepts to be contained in an instrument would be one of the essential elements of the study’.⁷¹ This includes defining ‘[c]ore principles of extraterritorial jurisdiction’, including protective jurisdiction.⁷² The draft proceeded to state that in any such instrument ‘... it would be necessary to indicate the extent to which the various jurisdictional principles may provide a valid basis for the extraterritorial assertion of prescriptive ... jurisdiction’.⁷³ It may be the case that these basic aims of codification may not be fully realised unless the relationship between grounds of jurisdiction is first clarified. This would require a comprehensive and unified study of protective jurisdiction in the international legal system.

6.5. Advantages of Codification

There are advantages to codifying protective jurisdiction, a number of which have already been highlighted, above, by the ILC. The advantage of codification, first and foremost, is that it will provide the opportunity, for the first time, for the ILC to study, and for governments to debate and exchange views on, the basic concept of protective jurisdiction. In that regard, codification could modestly aim to define protective jurisdiction and indicate the extent to which it provides a valid basis of prescriptive

⁶⁹ Yee, S. (2011). ‘Universal Jurisdiction: Concept, Logic, and Reality’. 10 *Chinese JIL* 503.

⁷⁰ U.N. Doc.A/61/10, *supra* n 42, paras.216, 226, 230; U.N. Doc.A/68/10, *supra* n 26, paras.2-4, 21, 24, 26, 29; U.N. Doc.A/CN.4/603 (10 June 2008), paras.46-47; U.N. Doc.A/CN.4/612 (26 March 2009), para.33; U.N. Doc.A/CN.4/L.774 (24 June 2010), at pp.6-7. Cf. U.N. Doc.A/59/10 (2004), Annex, paras.9-10.

⁷¹ *Supra* n 42, para.39.

⁷² *Ibid.*, para.42.

⁷³ *Ibid.*, para.44.

jurisdiction over domestic and international crimes. This is important, not least because protective jurisdiction is little understood and therefore tends to be interpreted by courts and in legal scholarship in overly-narrow terms. It may be the case that the ambiguity surrounding this jurisdiction means that it is not always used to the full extent permitted by international law, or that other grounds of jurisdiction are inappropriately claimed in its stead.

The ILC may decide whether such an instrument shall indicate the extent to which protective jurisdiction may be exercised collectively by States, for the mutually beneficial protection of each other's vital interests from common threats. This would codify a customary right which developed in respect of war crimes in the aftermath of World War II and is currently being used by some States, by virtue of Article 105 of the U.N. Convention on the Law of the Sea, in response to the outbreak of Somali piracy.⁷⁴ Such a provision may be particularly useful for regional organisations, for example, the Council of Europe, African Union or Arab League, or by collective security alliances, for example, North Atlantic Treaty Organisation and the Gulf Cooperation Council.⁷⁵ The ability for States to exercise protective jurisdiction on behalf of each other, in order to protect not only their own vital interests but also the interests of their allies, should they choose to do so, may be of particular value for combatting the threat of international terrorism. This was alluded to by the court in the *Bin Laden* case, which concerned the bombing of U.S. embassies in Kenya and Tanzania.⁷⁶ The court *inter alia* stated that there is no authority in international law for limiting the extraterritorial application of a statute justified under the protective principle 'to victims who are citizens of the nation that enacted the statute'. The court continued:

Nor is such a limitation consistent with the purposes the protective principle is designed to serve. Such a limitation [given that foreign nationals are

⁷⁴ See chapters one & three. Garrod, M., 'The Response by the International Community to Somali Piracy: Universal Jurisdiction or Collective Protective Jurisdiction *Par Excellence*' (under preparation).

⁷⁵ NATO, 'Strengthening NATO-Gulf cooperation', 20 October 2014, available online: www.nato.int/cps/en/natohq/opinions_113987.htm?selectedLocale=en; Wales Summit Declaration, 'Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales from 4 to 5 September 2014', para.32, 5 September 2014, available online: www.gov.uk/government/publications/nato-summit-2014-wales-summit-declaration/the-wales-declaration-on-the-transatlantic-bond; Remarks by President Obama at NATO Summit Press Conference, 5 September 2014, available online: www.whitehouse.gov/the-press-office/2014/09/05/remarks-president-obama-nato-summit-press-conference.

⁷⁶ *U.S. v Bin Laden*, 92 F.Supp.2d.189 (S.D.N.Y., 13 March 2000). See also *U.S. v Manssor Arbabsiar and Ali Gholam Shakur*, 11 MAG 2617 (S.D.N.Y., 11 October 2011).

likely to be near Federal facilities located in foreign countries] could only weaken the protective function of a statute designed to protect United States interests.⁷⁷

It will be recalled from chapter five that numerous counter-terrorism treaties and Security Council Resolution 1373 already require States, pursuant to the obligation to extradite or prosecute, to establish ‘treaty-based’ jurisdiction on behalf of each other in circumstances where an accused is present on a State’s territory and is not extradited to the State that has a connection, including threats to its vital interests, with the alleged offence.⁷⁸

The instrument could clarify that protective jurisdiction does not require crimes to be directed at, or have an effect in, the prescribing State’s territory; that protective jurisdiction is applicable over acts of terrorism and other serious crimes against the State’s nationals; and that this jurisdiction is applicable over piracy on the high seas and *ipso facto* does not require any evidence of a connection with the prescribing State.⁷⁹ These considerations could, in turn, assist the ILC in attaining greater conceptual clarity between protective jurisdiction and other grounds, most notably the universality, passive personality and effects principles. The need for such clarity is highlighted by the Secretariat’s draft and is important for a further reason: theories relating to grounds of jurisdiction and the reliance on, or reference to such theories, by States and courts in order to support a particular assertion of jurisdiction do not always reflect with sufficient accuracy customary international law *lex lata*.

The second advantage to codification, if the approach proposed in chapter five is adopted by the ILC, would provide an opportunity to identify more clearly the type of vital interests falling under the ambit of protective jurisdiction. It will be recalled from chapter five that there is no established test for the qualification of interests as ‘vital’. The instrument could enumerate, in a non-exhaustive way, what these interests comprise in order to indicate with greater clarity and certainty the scope and application of this jurisdiction in international law. The Secretariat’s draft, it will be recalled from the discussion above, alluded to a trend in State practice in the use of protective jurisdiction for responding to international terrorism and suggested that ‘some States

⁷⁷ *Ibid.*, at p.222.

⁷⁸ S/RES/1373 (28 September 2001).

⁷⁹ See chapters two, three and five.

have broadened their interpretation of the concept of “vital interests” in order to address terrorism’.⁸⁰ This would suggest that the Secretariat had in mind the need to study such interests by the ILC. This trend in jurisdiction for the protection of vital interests in response to the threat of international terrorism is confirmed by the detailed empirical analysis of State practice, in chapter four, and the growing body of treaty and Security Council practice, discussed in chapter five. It will be recalled that chapter five enumerated 13 vital State interests, 10 of which are shared by the international community, that have been included under protective jurisdiction *lex lata*. The fundamental conceptual distinction, explained in chapter five, between ‘shared vital State interests’ and ‘international community values’, needs to be duly taken into account by the ILC. The purpose of this distinction is not to enter into a theoretical analysis of the matter but, rather, in order to show more clearly that the protection of shared vital State interests is distinct from universal jurisdiction.

The absence of an instrument codifying jurisdiction has meant that the rules on extraterritorial jurisdiction have been left wholly to State practice to regulate on an *ad hoc* and isolated basis. Accordingly, the third advantage to codification is that an instrument could provide a persuasive source of guidance for States in the drafting and enactment of national laws and for domestic courts in the application of the law and in the resolution of disputes. It could also prevent unpredictable developments and controversies arising from unilateral action. A related matter is ensuring some legal certainty and consistency in the discovery, interpretation and application of customary rules in respect of grounds of extraterritorial jurisdiction by legislators and judges from across nearly 200 different States.

The importance of these issues should not be underestimated. There is, at present, great uncertainty on how legislators and judges discover customary rules - both in terms of the formation process and sources of evidence - and how well equipped they are to grapple with the discovery of such rules. It is for these and other reasons that the ILC has included this topic in its programme of work.⁸¹ The empirical study into State practice in chapter four shows that States do not tend to explain in national laws the ground of prescriptive jurisdiction relied upon in order justify their extraterritorial

⁸⁰ *Supra* n 42, para.20.

⁸¹ U.N. Doc.A/66/10 (2011), Annex A; U.N. Doc.A/67/10 (2012), paras.19, 160.

application; nor do national laws tend to specify or define the vital interests protected. Judges, in the extraterritorial application of national laws in particular cases, are not always capable or willing to examine State practice in order to determine which theory should form the most appropriate basis of extraterritorial jurisdiction. In that regard, there appears to be a tendency by judges, in support of a particular ground of jurisdiction under customary international law, to rely on tentative sources of evidence, or to haphazardly rely on primary sources or interpret such sources wholly out of context.⁸² The adoption of an instrument codifying jurisdiction, thus securing a common understanding of protective jurisdiction, could be of considerable practical importance to States and courts by providing guidance in the ascertainment and application of the law.

The need for consistency and certainty is all the more important with regard to the fragmentation of international law; this is illustrated no clearer than the conflict between the supposed codification of customary rules of jurisdiction by special legal regimes governing piracy and war crimes, on the one hand, and the rules on extraterritorial jurisdiction in the treaty regime governing extradite or prosecute and general international law, on the other.⁸³

The aforementioned considerations apply, *mutatis mutandis*, to the resolution of disputes by the ICJ. The ICJ in the *Arrest Warrant* was presented, for the first time since the *Lotus* case was decided in 1927, with the opportunity to examine grounds of jurisdiction under customary international law but it chose not to do so.⁸⁴ The separate and dissenting opinions appended to the judgment, despite criticising the court, reveal a limited understanding of extraterritorial jurisdiction and elements of confusion on the relationship between protective jurisdiction and theories of universality and passive

⁸² E.g., *Joyce v DPP* [1946] A.C. 347; *Attorney-General of the Government of Israel v Adolf Eichmann*, 36 ILR 5 (District Court, 12 December 1961); *Attorney-General of the Government of Israel v Adolf Eichmann*, 36 ILR 277 (Supreme Court, 29 May 1962); *U.S. v Yunis*, 681 F.Supp.909 (D.D.C., 1988); *U.S. v Yunis*, 924 F.2d1086 (D.C. Cir., 1991); *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p. Pinochet Ugarte (No 3)* [1999] 2 All ER 97, at pp.108-111 (Lord Browne-Wilkinson); *ibid.*, at pp.177-178 (Lord Millett); *Prosecutor v Furundzija*, Case No.IT-95-17/1-T, Trial Chamber, at pp.58-61 (International Criminal Tribunal for the Former Yugoslavia, 10 December 1998); Special Tribunal for Lebanon (Appeals Chamber), Interlocutory Decision on the Applicable Law, *Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/1, 16 February 2011.

⁸³ Discussed above.

⁸⁴ *Lotus*, *supra* n 13; *Arrest Warrant*, *supra* n 60.

personality.⁸⁵ In the more recent *Habré* case, the analysis of which has been undertaken in chapter five, the ICJ described *obiter* the obligation to extradite or prosecute as ‘universal jurisdiction’, without having any regard to State practice or providing any analysis of grounds of jurisdiction in international law.⁸⁶

The codification of jurisdiction would also complement the existing codification efforts by the ILC of other legal regimes, not least the topics of ‘Obligation to extradite or prosecute’ and ‘Immunity of State officials from foreign criminal jurisdiction’. At present, the ILC has to codify these and other topics under the *de facto* precondition that all grounds of jurisdiction are relevant and taken into account and, at the same time, it is not able to undertake any assessment of, or pronouncement on, them as they fall outside of the immediate scope of these topics.⁸⁷

An instrument codifying jurisdiction could also be of practical significance for the Security Council in the adoption of counter-terrorism resolutions, a number of which, as will be recalled from chapter four, have obliged States to make provision for extraterritorial jurisdiction but have not referred to, or explained, grounds of jurisdiction. In that connection, an instrument codifying protective jurisdiction could contribute to a more comprehensive jurisdictional framework for combatting international terrorism.

6.5.1. The Existing International Legal Framework for Combatting International Terrorism

As a matter of practical importance, the fourth advantage of codifying protective jurisdiction, to which the ILC may have regard, is that such an instrument could be used to complement and strengthen the existing legal response by the international community in combatting the complex threat of international terrorism. This proposal is based on the finding that, first of all, one of the broad characteristics of international terrorism is that the State and its nationals tend to be the target, and acts of terrorism threaten or implicate, directly and indirectly, certain shared vital State interests; and,

⁸⁵ *Ibid.*, para.47 (J. Sep. Op. Judges Higgins *et al.*); *ibid.*, para.5 (Sep. Op. Judge Rezek); *ibid.*, paras.5, 7 & 12 (Sep. Op. Judge Guillaume).

⁸⁶ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, I.C.J. Reports 2012, p.32, paras.74-75.

⁸⁷ E.g., U.N. Doc.A/CN.4/661, *supra* n 26, paras.39-40; U.N. Doc.A/68/10, *supra* n 26, Annex A; U.N. Doc.A/67/10, *supra* n 81, para.214.

secondly, protective jurisdiction is the principal means by which States combat the threat of international terrorism and the trend in State, treaty and Security Council practice in this regard.⁸⁸ The ILC could draw on this fertile bed of practice in the elaboration of such an instrument. The desirability of codifying extraterritorial jurisdiction and its use for combatting international terrorism and other transnational crimes, it will be recalled, was alluded to by Rao,⁸⁹ while the Secretariat's draft reported that protective jurisdiction 'may be of particular relevance to new types of cyber crimes and terrorist offences'.⁹⁰

The adoption of an instrument indicating more clearly the scope of protective jurisdiction, and some of the vital interests that fall under its ambit, could be used to 'fill in' gaps left by the existing regime of counter-terrorism treaties. There is, at present, no international jurisdictional framework in place, let alone a comprehensive one, for combatting international terrorism. The legal framework created by the Security Council in the adoption of counter-terrorism resolutions has remained silent as to grounds of jurisdiction.⁹¹ Counter-terrorism treaties have, since the 1960s, been adopted *ad hoc*, and often sporadically, in response to specific incidents.⁹² As there is no internationally agreed legal definition of 'terrorism', these treaties do not define 'terrorism' or refer to it in their operative provisions. Nor do they specify grounds of jurisdiction or, for that matter, the type of vital interests that parties may protect.⁹³ Rather, such treaties specify a narrow set of objectively determined circumstances in which parties are required or permitted to establish extraterritorial jurisdiction over well-defined offences. It is due to the inadequacy of the existing sectoral approach in responding to the complex and evolving threat of international terrorism, perhaps, that the more recent adoption of treaties criminalising terrorist bombing and financing provide for a wider range of circumstances in which parties are permitted to establish extraterritorial jurisdiction.⁹⁴ It also has to be borne in mind that international terrorism is not self-contained and is 'closely connected' to other transnational crimes falling outside counter-terrorism treaties, including organised crime, the traffic of illicit drugs,

⁸⁸ Chapters four and five.

⁸⁹ *Supra* n 28, at pp.237-238.

⁹⁰ ILC Secretariat, *supra* n 42, para.20.

⁹¹ Chapter four.

⁹² See also chapters one and five.

⁹³ See also chapters one, four and five.

⁹⁴ 1997 International Convention for the Suppression of Terrorist Bombings, 2149 U.N.T.S. 256; 1999 International Convention on the Suppression of the Financing of Terrorism, 2178 U.N.T.S. 197.

unlawful arms trade, money laundering and smuggling of nuclear and other dangerous materials.⁹⁵

The need for a more comprehensive approach in combatting international terrorism is the reason why the U.N. General Assembly mandated the Ad Hoc Committee on Terrorism to elaborate a draft Comprehensive Convention on International Terrorism, which it has been negotiating since 2000.⁹⁶ The Sixth Committee, in 2006, established a Working Group to carry out the mandate of the Ad Hoc Committee more expeditiously.⁹⁷ Neither the Ad Hoc Committee nor the Sixth Committee has been able to bring to completion and they have reached a point of ‘inertia’.⁹⁸ One of the more fundamental reasons accounting for the failure to adopt a comprehensive convention, which has divided States since the beginning of negotiations, is the definition of ‘terrorism’. The adoption of such a convention does not therefore appear likely in the foreseeable future. In any case, some of the delegations during the negotiations of the Ad Hoc Committee have observed that the comprehensive convention ‘would not be the final answer or sole response of the international community to combating international terrorism’.⁹⁹

The Security Council has determined and reaffirmed that ‘terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security’.¹⁰⁰ However, the absence of an international definition of ‘terrorism’ means that ‘terrorism in all its forms and manifestations’, and the nature and scale of the threat, are *ipso facto* incapable of being objectively determined and encompassed within sectoral treaties. This means that the threat of international terrorism is relative and can differ considerably, depending on the State against which terrorist groups are fighting or against whose nationals and vital interests are implicated. It may be the case that the

⁹⁵ S/RES/1373, *supra* n 78, para.3(4); S/RES/2160 (17 June 2014), preambular paras.3, 11, 18, 25 & operative para.4; S/RES/2161 (17 June 2014), preambular paras.18, 20; A/RES/49/60 (9 December 1994), preambular paras.4 & 5; A/RES/51/210 (17 December 1996), para.3(f); A/RES/60/288 (20 September 2006).

⁹⁶ A/RES/51/210, *ibid.* Annual reports of the Ad Hoc Committee on Terrorism are available online: www.un.org/law/terrorism/index.html.

⁹⁷ U.N. Doc.A/C.6/61/SR.7 (7 November 2006), paras.101-106.

⁹⁸ U.N. Doc.A/64/37 (2009), Annex II, para.4.

⁹⁹ U.N. Doc.A/65/37 (2010), Annex I, at pp.5-6.

¹⁰⁰ S/RES/2161, *supra* n 95, preambular para.2; S/RES/2178, *supra* n 2, preambular para.1; S/RES/2133 (27 January 2014), preambular para.1; S/RES/2170 (15 August 2014), preambular para.3; S/PRST/2013/1 (15 January 2013), preambular para.3.

sectoral approach, which could reasonably be described as a ‘patchwork of jurisdictions’, limited to circumstances foreseen by treaties, is not entirely satisfactory for responding to the complex and evolving nature of the threat ‘in all its forms and manifestations’. In a globalised society, the use of information and communication technologies, in particular the Internet, for terrorist purposes, including recruitment, incitement, financing, planning and preparation, provides just one example.¹⁰¹ The reason why the Council’s Counter-Terrorism Committee has defended its position of not defining ‘terrorism’ and other related concepts used in resolution 1373 is that ‘terrorists adapt to newer technologies and methods for committing terrorist acts.’¹⁰²

A number of recent incidents show the complexity and power of terrorist groups relative to that of States. The first of these is the armed conflict in the territory of Ukraine, since April 2014, between pro-Russian armed groups and the Ukrainian Government. These groups are allegedly trained, armed and funded by Russia.¹⁰³ Yet they are regarded by Ukraine as ‘terrorists’ and, upon capture, prosecuted as such.¹⁰⁴ On 17 July 2014, these groups allegedly used a surface-to-air missile in order to down a Malaysian registered civilian aircraft, flight MH17, resulting in the death of all 298 passengers and crew of ten different nationalities, including the nationals of some of the members of the Security Council. The Security Council has not recognised these ‘armed groups’ as ‘terrorists’, perhaps due to the alleged relationship between them and Russia. Nonetheless, in the only resolution that the Security Council has managed to adopt on the situation in Ukraine, the Security Council has deplored the downing of the aircraft and emphasised the importance of holding those responsible criminally accountable.¹⁰⁵ The dynamics of the Security Council add a further layer of complexity in responding to

¹⁰¹ S/RES/2133, *ibid.*, preambular para.11; S/RES/2170, *ibid.*, preambular para.13; S/RES/2160, *supra* n 95, preambular para.27; S/RES/2161, *supra* n 95, preambular para.21; Council Framework Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330 of 9 December 2008, p.21, paras.3-4; HC, Home Affairs Committee - Seventeenth Report, Counter-terrorism, 30 April 2014, para.5; U.N. Office on Drugs and Crime, ‘The use of the Internet for terrorist purposes’, 22 October 2012, available online: www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf.

¹⁰² Technical Guidance to the Implementation of Security Council Resolution 1373 (2001), (2009) Compiled by the Counter-Terrorism Committee Executive Directorate, at p.13.

¹⁰³ NATO, ‘Secretary General statement after the extraordinary meeting of the NATO-Ukraine Commission’, 29 August 2014, available online: www.nato.int/cps/en/natolive/news_112104.htm.

¹⁰⁴ Council of Europe, Parliamentary Assembly, 2014 Ordinary Session Report, Twenty-fifth sitting, Office of the U.N. High Commissioner for Human Rights, ‘Report on the human rights situation in Ukraine’, 17 August 2014, paras.12, 14, 40 & 105.

¹⁰⁵ S/RES/2166 (21 July 2014), preambular paras.1, 2, & operative para.1, 11.

international terrorism and, as is made clear by resolution 2166, the inertia by the Security Council means that it is up to those ‘States who have lost nationals on MH17’ to institute criminal investigations related to this incident.¹⁰⁶

A further example of the ‘diffuse’ and ‘growing’ threat is shown by the ‘gravest concern’ expressed by the Security Council over the large-scale military offensive and control of territory in parts of Iraq and Syria by the Islamic State in Iraq and the Levant (ISIL) and Al Nusrah Front (ANF) and ‘associated armed groups’, both of which, according to the Council, are ‘associated’ with al Qaeda.¹⁰⁷ A new dimension to the threat of international terrorism, in the words of the President of France, speaking in a meeting of the Security Council in the adoption of resolution 2178 under Chapter VII, is that ‘it is now looking to conquer territory, to set up States ... and also to recruit a growing number of our citizens, wherever they may be, into its ranks.’¹⁰⁸ In that connection, the Security Council has expressed ‘concern’ over the scale of the unprecedented flow of ‘foreign terrorist fighters’ from numerous other countries to assist ISIL and ANF and, to that end, the use of the Internet.¹⁰⁹ These fighters are estimated to number between 11000 and 31000 and come from more than 80 States.¹¹⁰ There is a concern that these fighters pose a major threat to States other than Iraq and Syria, first of all, by returning to their home States and committing acts of terrorism and, secondly, by planning and directing attacks against home States and the vital interests of home States located abroad, either from within Iraq and Syria or by crossing national borders to other ungoverned spaces.¹¹¹ This makes the nature of the threat more diverse and geographically dispersed. These issues have recently been acknowledged by the U.K. Home Affairs Committee, in its assessment of the threat of international terrorism in the light of the Syrian crisis:

¹⁰⁶ *Ibid.*, preambular para.2 & operative para.11.

¹⁰⁷ S/RES/2169 (30 July 2014), preambular para.4; S/RES/2170, *supra* n 100, preambular paras.4-5; S/RES/2178, *supra* n 2, preambular paras.2-3.

¹⁰⁸ U.N. Doc.S/PV.7272 (24 September 2014), at p.6. See also Burke, J., ‘Al-Qaida leader announces formation of Indian branch’, *The Guardian*, 4 September 2014.

¹⁰⁹ S/RES/2170, *supra* n 100, preambular paras.12-13 & operative para.7; S/RES/2178, *supra* n 2, preambular paras.12, 15.

¹¹⁰ U.N. Doc.S/PV.7272, *supra* n 108, at p.3; Home Affairs Committee, *supra* n 101, paras.43-47; Prince, R. (ed.), ‘CIA says number of Islamic State fighters in Iraq and Syria has swelled to between 20,000 and 31,500’, *The Telegraph*, 12 September 2014.

¹¹¹ *Ibid.*, at pp.4, 1-15, 24, 28, 33, 36, 38; S/RES/2178, *supra* n 2, preambular para.10; Home Affairs Committee, *ibid.*, paras.2, 4, 5, 18, 22, 27, 28, 39, 49, 53.

Today there are more Al Qa'ida inspired terrorist groups than in 2001, spread across a wider geography, with a more diverse and evolving set of capabilities. A common feature among these terrorist groups is that the UK features as a primary target. [...] The threat from terrorism to the UK and its interests overseas is more diverse and geographically dispersed than it was a decade ago.¹¹²

A further dimension of the threat is that States in support of the overthrow of the Syrian regime reportedly arm and fund anti-government groups operating in Syria, while some of these groups have complex relationships and allegiances with terrorist groups, including ISIL and ANF.¹¹³ The legitimate armed opposition groups of some States (particularly Western States) clearly continue to be the 'terrorists' of others (most notably Syria).¹¹⁴

The taking hostage of British and U.S. nationals by ISIS and ANF marked an important turning point in the Council's response to the threat posed by these groups. It prompted Britain to draft a resolution under Chapter VII, which was adopted unanimously as resolution 2170.¹¹⁵ This resolution, among other things, condemned the 'terrorist acts' of these groups and urged all States, in accordance with their obligations under resolution 1373, 'to cooperate in efforts to find and bring to justice' individuals and 'foreign terrorist fighters' associated with these groups who perpetrate, organise and sponsor terrorist acts.¹¹⁶ The Security Council has urged all States, in accordance with their obligations under international law and relevant Security Council resolutions, to cooperate actively with the U.S. and Britain in this regard.¹¹⁷ ISIL and ANF pose a serious threat to certain of the vital interests of Iraq and Syria but also of other States, including the Council's members, such as their sovereignty, security, territorial integrity, independence, internationally protected persons and property and nationals.¹¹⁸

¹¹² *Ibid.*, paras.2, 4, 6-7.

¹¹³ *Ibid.*, paras.42, 52;

Armed Conflict in Syria: Overview and U.S. Response, U.S. Congressional Research Service, 17 September 2014; Roberts, D. 'Senate approves Obama's plan to arm and train Syrian rebels', *Guardian*, 19 September 2014; Stephens, M., 'Islamic State: Where does jihadist group get its support?', *BBC*, 1 September 2014, available online: www.bbc.co.uk/news/world-middle-east-29004253.

¹¹⁴ U.N. Doc.S/PV.7272, *supra* n 108.

¹¹⁵ *Supra* n 100.

¹¹⁶ *Ibid.*, preambular para.9 & operative paras.5 & 8.

¹¹⁷ Press Statement, Murder of James Foley, SC/11531-IK/689 (22 August 2014); Press Statement, Murder of Steven Sotloff, SC11550 (6 September 2014); Press Statement, Murder of David Haines, SC11557 (14 September 2014); Press Statement, Murder of Alan Henning, SC11590 (3 October 2014).

¹¹⁸ S/RES/2161, *supra* n 95, preambular para.6; S/RES/2169, *supra* n 107, preambular paras.2-5; S/RES/2170, *supra* n 100, preambular paras.2, 11; European Council, 'Special meeting of the European Council', EUCO 163/14, Brussels, 30 August 2014; Mills, C., 'Military and Humanitarian Assistance to

This is made no clearer than the high-level summit on the adoption of resolution 2178 *inter alia* by the Security Council and the large number of States whose interests are ‘specially affected’ by the situation in Syria and Iraq.¹¹⁹ The gravity of the threat posed by ISIL and ANF may be summed up by the speech of President Obama on the U.S. strategy for combatting it: ‘if you threaten America, you will find no safe haven’.¹²⁰ The threat is deemed so great that the U.S., with support of coalition partners, has conducted military airstrikes in Iraq and Syria where it is necessary to protect U.S. nationals, personnel and facilities.¹²¹

The States in whose territory terrorist groups operate or acts of terrorism are committed, due to the complex, transnational nature of the threat, may be incapable or unwilling of undertaking prosecutions in all circumstances. This means that the States whose vital interests are implicated may need to establish protective jurisdiction in order to ‘bring to justice’ alleged offenders. In the light of the foregoing considerations, the adoption by the ILC of an instrument codifying protective jurisdiction may be timelier than ever before. Such an instrument, as noted above, could have as its focus the vital interests that States are permitted to protect, rather than a list of specified offences. This approach provides for essential flexibility in order to respond to the evolving nature of international terrorism and overcome the differing and divergent national laws on ‘terrorism’, on the one hand, and indicates the permissible limits of jurisdiction, on the other.¹²² An instrument of this type would apply equally to other transnational crimes, including those connected to international terrorism.

While such an instrument will not solve the problem of international terrorism, it could provide part of a response to what has been described by the Ad Hoc Committee on

Iraq’, HC, SN06960, 1 September 2014; HC Debates, Vol.585, Col.24, 1 September 2014; HC Debates, ‘Iraq: Coalition Against ISIL’, Vol.585, Col.1255, 26 September 2014, Cols.1255-1256; Cameron, D. & Obama, B., ‘We will not be cowed by barbaric killers’, *The Times*, 4 September 2014; Johnston, C., ‘Isis militants release 49 hostages taken at Turkish consulate in Mosul’, *The Guardian*, 20 September 2014; Irish, J. & Chiki, L., ‘French national taken in Algeria, group claims kidnapping’, *Reuters*, 22 September 2014, available online:

www.reuters.com/article/2014/09/22/us-algeria-france-kidnapping-idUSKCN0HH2FC20140922.

¹¹⁹ U.N. Doc.S/PV.7272, *supra* n 108, at pp.4-6, 8, 13-16, 18, 25-26, 28, 33, 38, 41. Provisional Rules of Procedure of the Security Council, U.N. Doc.S/96/Rev.7, Rule 37.

¹²⁰ The White House, Office of the Press Secretary, Statement by the President on ISIL, 10 September 2014, available online:

www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1.

¹²¹ Mills, *supra* n 118.

¹²² Chapter five.

Terrorism as a ‘multifaceted’ problem requiring a ‘multidimensional and coordinated approach’.¹²³ In that connection, an instrument indicating more clearly the vital interests that may be protected from international terrorism could enhance coherence and uniformity in the adoption of national laws, in particular in the implementation of Security Council resolutions, which simply use the term ‘terrorist acts’. It could also potentially strengthen inter-State cooperation.

6.6. Disadvantages to Codification

Notwithstanding the advantages of an instrument codifying protective jurisdiction, such an approach does have its disadvantages owing to the inherently complex and sensitive nature of the topic. This is so because it reflects two cardinal elements of the very concept of the State, namely sovereignty and government power.

The first principal disadvantage turns on the fact that agreement on jurisdiction would have to be in the abstract. The reason for this is that the form of jurisdiction under consideration is jurisdiction to prescribe. The ‘protective principle’, as with all theories relating to grounds of jurisdiction, is an academic construct, first defined by the Harvard Research in a Draft Convention, and its use in State practice has to be inferred principally from national laws.¹²⁴ The number of occasions on which such jurisdiction is applied by national courts is very small. Since the Harvard Research, there have been hardly any inter-State disputes arising from the exercise of extraterritorial criminal jurisdiction, with the majority of jurisdictional conflicts arising out of national laws governing international trade.¹²⁵ The ICJ, since the *Lotus* case was decided in 1927, has been presented with only two opportunities to examine grounds of extraterritorial jurisdiction.¹²⁶

In view of the limited application of extraterritorial jurisdiction by domestic courts and the absence of authoritative guidance by the ICJ, one might doubt whether there could be any possible agreement on a ground of prescriptive jurisdiction, such as the protective principle, in the abstract. This is made all the more problematic in that, since

¹²³ U.N. Doc.A/66/37 (2011), Annex I, para.3.

¹²⁴ *Supra* n 10.

¹²⁵ ILC Secretariat, *supra* n 42, paras.23-27; Council of Europe, European Committee on Crime Problems (1992). ‘Extraterritorial Criminal Jurisdiction’, reprinted in 3 *CLF* 441, at p.444; IBA, ‘Report of the Task Force on Extraterritorial Jurisdiction’, 2009, available online: www.tinyurl.com/taskforce-etj-pdf.

¹²⁶ *Lotus*, *supra* n 13; *Arrest Warrant*, *supra* n 60; *Belgium v Senegal*, *supra* n 86.

the Harvard Research, States have unilaterally adopted their own interpretation of grounds of extraterritorial jurisdiction, which may have become embedded in their own national legal systems, constitutions and cultures. In that connection it should be borne in mind that there will be differences of opinion as to which theory should form the basis of a particular form of extraterritorial jurisdiction. The difficulty of reaching agreement, even on a regional level, is illustrated by the report of the Select Committee of Experts on Extraterritorial Jurisdiction, set up by the European Committee on Crime Problems, which was mandated to ‘make a comparative study of the rules and principles of territorial and extraterritorial jurisdiction applied in member states or derived from international agreements, as well as their justification’. According to the Committee of Experts, the terms of reference in respect of the form that its findings were to take were ‘probably deliberately vague’.¹²⁷ The reason for this, according to the Committee of Experts, is due to the realisation by the Committee of Ministers that it would not be easy to reach agreement on the scope of extraterritorial jurisdiction.¹²⁸ In the light of this reality, the Committee of Experts therefore chose to prepare a general report, ‘confined to making a number of statements for consideration by member states, in particular when legislating to establish extraterritorial jurisdiction’.¹²⁹ The Committee of Ministers was asked only to agree that the report merited publication and distribution, and not to endorse the statements put forward in it.¹³⁰

That said, the ILC and the Secretariat’s draft do not regard the abstract nature of the topic as preventing codification.¹³¹ Protective jurisdiction has increasingly been applied by some domestic courts and required extradition of alleged offenders in order to be enforced, which the ILC may draw upon.¹³² This practice has not been internationally protested. The ILC’s inclusion of other topics in its programme of work, for example, ‘Formation and evidence of customary international law’ and ‘The obligation to extradite or prosecute’ and ‘Immunity of State officials from foreign criminal jurisdiction’ and ‘Fragmentation of international law: difficulties arising from the diversification and expansion of international law’, shows that States are prepared to

¹²⁷ Council of Europe, *supra* n 125, at p.443.

¹²⁸ *Ibid.*, at pp.443-444.

¹²⁹ *Ibid.*, at p.444.

¹³⁰ *Ibid.*

¹³¹ ILC Secretariat, *supra* n 42, paras.42-43; ILCYB, *supra* n 28, at pp.238-241.

¹³² *Ibid.*, para.20.

codify topics in the abstract.¹³³ The abstract nature of topics, *a contrario*, presents an argument in support of codification. Indeed, in the absence of such codification, it is not until States attempt to unilaterally enforce extraterritorial jurisdiction and inter-State disputes ensue that abstract concepts are debated. This is precisely what has occurred in respect of the theory of universal jurisdiction. The debate on universal jurisdiction shows that because of its abstract nature there is little understanding of, and considerable differences of opinion on, the basic concept, as well as the way in which it has developed in State practice; its contemporary scope and application; and the international community values that it is supposed to protect. Nonetheless, it also shows that States are willing to debate and try and reach agreement on jurisdiction in the abstract. Given that similar issues are likely to arise in respect of protective jurisdiction, codification appears all the more necessary and desirable.

The second disadvantage to codification relates, more specifically, to the difficulty of attaining consensus on the type of vital interests that may be protected. One of the main reasons why this is so, it will be recalled from chapter five, is because the meaning of vital interests is ambiguous and they might not be easy to identify. Another is that some such interests, for example, ‘sovereignty’, ‘governmental functions’ and ‘security’, are capable of expansive interpretation.¹³⁴ Ryngaert has observed that, while it appears desirable to adopt a convention on protective jurisdiction, nonetheless, as in other fields of jurisdiction, ‘such a convention might prove elusive in the face of tenacious State interests.’¹³⁵ The observation by Ryngaert reflects the opinion of the drafters of the Restatement, which favoured a narrow approach to protective jurisdiction so that it could not be used in ways objectionable to U.S. interests.¹³⁶

In modern treaty practice, since the mid-twentieth century, States have favoured the approach of defining narrow circumstances in which parties are permitted or required to establish extraterritorial jurisdiction, rather than make reference to, or define, the type of

¹³³ U.N. Doc.A/CN.4/653, *supra* n 26; U.N. Doc.A/59/10, *supra* n 70; U.N. Doc.A/RES/57/21 (21 January 2003).

¹³⁴ E.g., Brierly, *supra* n 4, at pp.255-256; Jennings, R.Y. (1957). ‘Extraterritorial Jurisdiction and the United States Antitrust Laws’. 33 *BYIL* 146, at p.155.

¹³⁵ Ryngaert, C. (2008). ‘Jurisdiction in International Law’. Oxford: OUP, at p.98.

¹³⁶ Jennings, R.Y. (1962). ‘The Limits of State Jurisdiction’. 32 *NoTIR* 209, at p.223.

vital interests that may be protected.¹³⁷ It is certainly the case that the reason why States have been able to adopt a considerable number of treaties providing for extraterritorial jurisdiction in response to transnational offences, including acts of terrorism, often speedily, is because such treaties avoid any negotiation of, or agreement on, vital interests.¹³⁸ The same point applies *mutatis mutandis* to the adoption by the Security Council of resolution 1373.¹³⁹ The upshot of all this is that vital interests generally have to be inferred from national laws, treaties and Security Council resolutions. The difficulty of achieving consensus on vital interests is further illustrated by the Committee of Experts, discussed above. The report *inter alia* was able to explain the theoretical justification for protective jurisdiction as the protection of ‘essential interests’ but it observed that ‘[t]here seems to be no consensus, however as to which interests should be defined as essential.’¹⁴⁰ The report was not prepared to examine vital interests; instead, it observed that ‘it is far from clear what kind of interests are covered by this qualification’ and suggested that [o]ne may wonder whether it is really possible and even wise to try to enumerate such interests’.¹⁴¹

Contrary to the opinion of the Committee of Experts, however, the ambiguous meaning of vital interests provides an argument in support of the need to examine and enumerate in an instrument, though not necessarily in an exhaustive way, what these interests comprise.¹⁴² This is so because it reflects the needs and mutually beneficial interests of States. The latter point has previously been the subject of works by Lauterpacht and Brierly; that is, to ignore such interests, as if they do not exist, is unrealistic and counterproductive.¹⁴³ Given that each State is able to unilaterally define its own vital interests and decide whether or not to recognise the validity of claims to such interests by other States, it is mutually beneficial to remove some of this ambiguity and bring such interests more clearly within the law’s protection.¹⁴⁴ Securing a basic level of agreement on the meaning of vital interests could also be of considerable practical

¹³⁷ E.g. Geneva Conventions of 1949 (Articles 49(I); 50(II); 129(III); 146(IV)); U.N. Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 U.N.T.S. 3, Article 105.

¹³⁸ Chapter five.

¹³⁹ S/RES/1373, *supra* n 78; also chapter four.

¹⁴⁰ *Supra* n 125, at p.451.

¹⁴¹ *Ibid.*

¹⁴² Chapter five.

¹⁴³ Lauterpacht, H. (1933). ‘The Function of Law in the International Community’. Oxford: Clarendon Press; Brierly, J.L. (1924). ‘The Shortcomings of International Law’. 5 *BYIL* 4; Brierly, J.L. (1944). ‘Vital Interests and the Law’. 21 *BYIL* 51.

¹⁴⁴ Lauterpacht, *ibid.*

importance. As has already been discussed above, this is so not least because it would allow for greater clarity and certainty of the extent to which the use of this jurisdiction is permitted by international law. It is perhaps worth noting, by way of aside, that the definition of vital interests by the Restatement, notwithstanding that it is a private codification of the law and does not reflect customary international law, has been heavily relied upon and applied by U.S. courts; the application of the Restatement does not appear to have received protest by the international community. It would also go some way to alleviating concerns raised in legal scholarship concerning the real and perceived abuse of protective jurisdiction.¹⁴⁵

The adoption of an instrument enumerating the type of vital interests that are encompassed by protective jurisdiction is of particular relevance for combatting common threats to such interests posed by transnational crimes, not least international terrorism. It will be recalled that the Secretariat's draft, above, observed that some States have broadened the concept of vital interests in order to combat international terrorism and indicated the need for the ILC to study this concept. This would suggest that vital interests are, in principle, regarded by the ILC as capable of codification. The latter point is supported by the finding in chapter five. That chapter aimed to shed important light on the matter by enumerating, based on State, treaty and Security Council practice, 13 vital State interests, 10 of which are shared by the international community, that have been included under protective jurisdiction *lex lata*. This body of practice has not led to inter-State disputes or protests by the international community. It would suggest a general acceptance by the international community of a core category of vital interests that is, in principle, capable of codification. The ILC could draw on this practice in the elaboration of an instrument.

6.7. Final Outcome of Codification

In sum, the above disadvantages are, in and of themselves, insufficient to prevent codification. A more common issue raised by codification is that there is a risk of stunting the development of the law. However, the need for codification seems especially significant given the wide gulf between what the law of protective

¹⁴⁵ E.g., Ryngaert, *supra* n 135, at p.97; Bowett, D.W. (1982). 'Jurisdiction: Changing Patterns of Authority over Activities and Resources'. 53 *BYIL* 1, at pp.10, 24; Cameron, I. (1994). 'The Protective Principle of International Criminal Jurisdiction'. Aldershot: Dartmouth, at p.327; Shaw, M.N. (2008). 'International Law'. Cambridge: CUP, at p.667.

jurisdiction is and what it is widely assumed to be. Rather, the main issue for consideration turns on the extent of agreement, which depends on the range and scope of the topic, and the form in which the instrument is to take.

The outcome of codification could take one of several forms. If the ILC decides to adopt a set of draft articles with commentary and recommends to the General Assembly the conclusion of a convention, requiring ratification, then any form of agreement may, at best, be rather limited.¹⁴⁶ It will be recalled that the efforts made by the League and the Harvard Research to codify protective jurisdiction were handicapped by the fact that they restricted themselves to questions that could only be codified by international conventions. It is worth noting that if the Assembly does decide to negotiate a convention on the topic and such a convention is eventually adopted and it is relevant for combatting international terrorism then States may be obliged, by virtue of resolution 1373, to ratify it.¹⁴⁷

On the other hand, the elaboration of an instrument on this topic need not be in the form of a convention. Rather, the ILC may be satisfied with a more modest approach, and avoid possibly divisive and inconclusive debate in the Sixth Committee, by the publication of a report containing a set of draft articles and commentary and a recommendation to the Assembly to take no further action. Alternatively, the ILC could recommend to the Assembly to ‘take note’ of or ‘adopt’ the aforesaid report in the form of a resolution or declaration and without taking any further action.¹⁴⁸ The latter approach was adopted by the Assembly in respect of the ILC’s draft articles on State responsibility, which have subsequently been used as a persuasive source of guidance and referred to and relied upon by States and the ICJ,¹⁴⁹ and in respect of the work of the ILC on the fragmentation of international law.¹⁵⁰ The conclusions of the ILC’s work on fragmentation are aimed to provide ‘a set of practical guidelines to help thinking about and dealing with the issue of fragmentation in legal practice’.¹⁵¹ Likewise, as regards the ‘Formation and evidence of customary international law’, it has been

¹⁴⁶ ILC Statute, *supra* n 1, Article 23(c)-(d).

¹⁴⁷ S/RES/1373, *supra* 78, para.3(d).

¹⁴⁸ ILC Statute, *supra* n 1, Article 23(a)-(b).

¹⁴⁹ Responsibility of States for Internationally Wrongful Acts, 2001, ILCYB, 2001, vol.II (Part Two); A/RES/56/83 (12 December 2001); *Application of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgement, I.C.J. Reports 2007, p.43.

¹⁵⁰ U.N. Doc.A/RES/61/34 (18 December 2006).

¹⁵¹ U.N. Doc.A/60/10 (2005), para.235.

proposed that the outcome of the ILC's work could take the form of a series of 'propositions' or a set of 'conclusions', with commentaries, the purpose of which should result in a practical guide for judges, government lawyers and practitioners.¹⁵² The ILC may decide to take a similar approach in respect of jurisdiction. It has to be borne in mind that, whichever of these approaches the ILC decides to take, the adoption of an instrument on this topic may take a number of years, and perhaps even decades. This has certainly been the case with equally complex and politically delicate topics that touch upon important State interests, for example, the Law of Treaties, Diplomatic Relations and State Responsibility, all of which were identified as 'necessary and desirable' for codification by the ILC at its First Session.¹⁵³

¹⁵² U.N. Doc.A/67/10, *supra* n 81, paras.160, 166, 191; U.N. Doc.A/68/10, *supra* n 26, paras.68, 73.

¹⁵³ Memorandum, *supra* n 14, at pp.50, 56; ILCYB, *supra* n 14, at pp.280-281; Responsibility of States for Internationally Wrongful Acts, *supra* n 149; Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 U.N.T.S. 331; Vienna Convention on Diplomatic Relations, Vienna 18 April 1961, 95 U.N.T.S. 500.

Bibliography

League of Nations Documents:

‘Documents from the League of Nations Committee of Experts for the Progressive Codification of International Law’, 20 *AJIL (Spec. Supp.)* (1926) 1

Second Session of the Committee of Experts for the Progressive Codification of International Law, Committee of Experts for the Progressive Codification of International Law, ‘Questionnaire No. 6: Piracy’, 20 *AJIL (Spec. Supp.)* (1926) 222

Second Session of the Committee of Experts for the Progressive Codification of International Law, Committee of Experts for the Progressive Codification of International Law, ‘Report on Extradition’, 20 *AJIL (Spec. Supp.)* (1926) 242

Second Session of the Committee of Experts for the Progressive Codification of International Law, Committee of Experts for the Progressive Codification of International Law, ‘Criminal Competence of States in respect of Offences Committed Outside their Territory’, 20 *AJIL (Spec. Supp.)* (1926) 252

Report of the Sub-Committee by Briery, J.L. (Rapporteur) & De Visscher, C. ‘Jurisdiction over Extraterritorial Crime’, annexed to Committee of Experts for the Progressive Codification of International Law, ‘Criminal Competence of States in respect of Offences Committed Outside their Territory’, 20 *AJIL (Spec. Supp.)* (1926) 252

‘General Introduction. Prospect for an International Conference on Codification of International Law’, 23 *AJIL (Spec. Supp.)* 1 (1929)

U.N. Security Council Documents:

Letter dated 20 December 1991 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, U.N. Doc. S/23306 (31 December 1991)

Letter dated 20 December 1991 from the Permanent Representative of the United Kingdom to the United Nations addressed to the Secretary-General, U.N. Doc. S/23307 (31 December 1991)

Letter dated 20 December 1991 from the Permanent Representative of the United States to the United Nations addressed to the Secretary-General, U.N. Doc. S/23308 (31 December 1991)

Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (2001)

Letter dated 7 October 2001 from the Charge D’Affaires of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/947 (7 October 2001)

‘Threats to international peace and security caused by terrorist acts’, U.N. Doc. S/PV.7272 (24 September 2014)

Provisional Rules of Procedure of the Security Council, U.N. Doc. S/96/Rev.7, Rule 37

Statements by the President of the Security Council:

U.N. Doc. S/23772 (2 April 1992)

S/PRST/2013/1 (15 January 2013)

U.N. Security Council Press Statements:

Press Statement, Malaysian Plane Crash, SC11480 (18 July 2014)

Press Statement, Murder of James Foley, SC/11531-IK/689 (22 August 2014)

Press Statement, Murder of Steven Sotloff, SC11550 (6 September 2014)

Press Statement, Murder of David Haines, SC11557 (14 September 2014)

Press Statement, Murder of Alan Henning, SC11590 (3 October 2014)

U.N. Security Council Counter-Terrorism Committee Documents:

Report of the European Union to the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism, U.N. Doc. S/2002/928 (16 August 2002)

‘Letter dated 22 October 2002 from the Chargé d’affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism’, U.N. Doc. S/2002/1193 (24 October 2002)

‘South Africa’s reply to the letter dated 15 April 2002 received from the Chairperson of the Security Council’s Counter-Terrorism Committee, Ambassador J. Greenstock, containing comments on South Africa’s national report (S/2001/1281) submitted pursuant to paragraph 6 of Security Council resolution 1373 (2001)’, U.N. Doc. S/2002/792 (2002)

‘Report by the Chair of the Counter-Terrorism Committee on the Problems Encountered in the Implementation of Security Council Resolution 1373 (2001)’, U.N. Doc. S/2004/70 (2004)

‘Statement by Professor Martin Scheinin, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism to the Counter-Terrorism-Committee of the Security Council’, New York (24 October 2005)

‘Report of the Counter-Terrorism Committee to the Security Council on the implementation of resolution 1624 (2005)’, U.N. Doc. S/2006/737 (2006)

‘Second report of the Counter-Terrorism Committee to the Security Council on the implementation of resolution 1624 (2005)’, U.N. Doc. S/2008/29 (2008)

‘Survey of the implementation of Security Council resolution 1373 (2001). Report of the Counter-Terrorism Committee’, U.N. Doc. S/2008/379 (2008)

‘Address of UN High Commissioner for Human Rights Navanethem Pillay to the Counter-Terrorism Committee of the Security Council’, New York (29 October 2009)

Report of the Counter-Terrorism Committee, ‘Survey of the implementation of Security Council resolution 1373 (2001) by Member States’, U.N. Doc. S/2009/620 (2009)

‘Technical Guide to the Implementation of Security Council Resolution 1373 (2001)’, Compiled by the Counter-Terrorism Committee Executive Directorate (2009)

‘Global Survey of the Implementation of Security Council Resolution 1373 (2001) by Member States’, U.N. Doc. S/2011/463 (1 September 2011)

National reports submitted by States to the CTC implementing resolution 1373, available online: www.un.org/en/sc/ctc/resources/countryreports.html

U.N. General Assembly Documents:

U.N. General Assembly Official Records, ‘Question of Palestine’, twenty-ninth session, U.N. Doc. A/PV.2282 and Corr.1 (13 November 1974)

Policy Working Group on the United Nations and Terrorism, ‘Identical letters dated 1 August 2002 from the Secretary-General addressed to the President of the General Assembly and President of the Security Council’, U.N. Docs. A/57/273-S/2002/875 (6 August 2002)

Request for the inclusion of an additional item in the agenda of the sixty-third session, ‘The scope and application of the principle of universal jurisdiction’, Letter dated 29 June 2009 from the Permanent Representative of the United Republic of Tanzania to the U.N. addressed to the U.N. Secretary-General, U.N. Doc. A/63/237/Rev.1 (23 July 2009)

U.N. Documents:

Legislative Series, 'National Laws and Regulations on the Prevention and Suppression of International Terrorism'. Part I. New York: United Nations (2002)

Legislative Series, 'National Laws and Regulations on the Prevention and Suppression of International Terrorism'. Part II. New York: United Nations (2005)

'International Instruments Related to the Prevention and Suppression of International Terrorism', New York: United Nations, 2008, available online:
www.unodc.org/documents/terrorism/Publications/Int_Instruments_Prevention_and_Suppression_Int_Terrorism/Publication_-_English_-_08-25503_text.pdf

Letter from the Permanent Mission of Lebanon to the Codification Division of the U.N. Office of Legal Affairs (15 April 2010)

International Legal Resources, Terrorism Legislation Database, National Legal Resources on Terrorism, available online: www.undoc.org/tldb/browse_countries.html

Statute of the Special Tribunal for Lebanon, available online:
www.stl-tsl.org/en/documents/statute-of-the-tribunal/statute-of-the-special-tribunal-for-lebanon

Reports of the U.N. Secretary-General:

'The Charter and Judgment of the Nuremberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General', U.N. Doc. A/CN.4/5 (1949)

'Measures to eliminate international terrorism. Report of the Secretary-General', U.N. Doc. A/54/301 (3 September 1999)

'A more secure world: our shared responsibility. Report of the High-level Panel on Threats, Challenges and Change', U.N. Doc. A/59/565 (2004)

'Measures to eliminate international terrorism. Report of the Secretary-General', U.N. Doc. A/65/175 (27 July 2010)

'The Scope and Application of the Principle of Universal Jurisdiction. Report of the Secretary-General prepared on the basis of comments and observations of Governments', U.N. Doc. A/65/181 (29 July 2010)

'The scope and application of the principle of universal jurisdiction. Report of the Secretary-General', U.N. Doc. A/66/93, (20 June 2011)

Sixth Committee of the U.N. General Assembly:

U.N. Doc. A/C.6/61/SR.7 (7 November 2006)

U.N. Doc. A/C.6/64/SR.12 (20 October 2009)

U.N. Doc. A/C.6/64/SR.13 (24 November 2009)

U.N. Doc. A/C.6/65/SR.10 (13 October 2010)

U.N. Doc. A/C.6/65/SR.11 (13 October 2010)

U.N. Doc. A/C.6/65/SR.10 (3 November 2010)

U.N. Doc. A/C.6/66/SR.12 (12 October 2011)

Coordinator of the Ad Hoc Committee on Terrorism, Report of the Working Group of the Sixth Committee on measures to eliminate international terrorism, U.N. Doc. A/C.6/65/L.10 (3 November 2010)

Report of the Sixth Committee, 'Measures to eliminate international terrorism', U.N. Doc. A/66/478 (15 November 2011)

'Observations by Belgium on the scope and application of the principle of universal jurisdiction' (2010), para.16, available online:
www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belgium_E.pdf

Information from and observations by China on the scope and application of the principle of universal jurisdiction (2010), para.6, available online:
www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/China_E.pdf

France, The scope and application of the principle of universal jurisdiction, Note submitted to the Office of Legal Affairs pursuant to General Assembly resolution 64/117 of 16 December 2009 (27 April 2010), available online:
www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/France_E.pdf

Spain, 'The scope and application of the principle of universal jurisdiction: information provided by Spain', Note submitted to the Office of Legal Affairs pursuant to General Assembly resolution 64/117 of 16 December 2009 (12 November 2010)

U.S. Submission Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction (2010), available online:
www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/United%20States.pdf

'The scope and application of the principle of universal jurisdiction: information provided by Spain' (2011), para.2, available online:
[www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Spain%20\(S%20to%20E\).pdf](http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Spain%20(S%20to%20E).pdf)

U.K., Scope and application of the principle of universal jurisdiction, Note submitted to the Office of Legal Affairs pursuant to General Assembly resolution 65/33 of 6 December 2010 (15 April 2011), available online:
www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/UK&Northern%20Ireland.pdf

Spain, Scope and principle of international jurisdiction: information provided by the Kingdom of Spain, Note submitted to the Office of Legal Affairs pursuant to General Assembly resolution 67/98 of 14 December 2010 (29 April 2013)

International Committee of the Red Cross, Information and Observations on the Scope and Application of Universal Jurisdiction, Note submitted to the Office of Legal Affairs pursuant to General Assembly resolution 65/33 (30 April 2013)

U.N. Audiovisual Library of International Law:

Greenwood, C., 'State Jurisdiction', Lecture Series, 2008, available online: www.un.org/law/avl/

Klein, P. (2009). 'International Convention for the Suppression of Terrorist Bombings', available online: www.un.org/law/avl

Reports of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996:

U.N. Doc. A/60/37 (2005)

U.N. Doc. A/64/37 (2009)

U.N. Doc. A/65/37 (2010)

U.N. Doc. A/66/37 (2011)

U.N. Doc. A/68/37 (2013)

International Law Commission:

ILCYB, 1950, vol. II

ILCYB, 1955, vol. I

ILCYB, 1956, vol. II

ILCYB, 1966, vol. II

ILCYB, 1972, vol. II

ILCYB, 1980, vol. II (Part One)

ILCYB, 1992, vol. II (Part Two)

ILCYB, 1993, vol. II (Part One)

ILCYB, 1996, vol. II (Part Two)

ILCYB, 1997, vol. II (Part Two)

ILCYB, 2001, vol. II (Part Two)

ILC, 'Origin and background of the development and codification of international law', available online: www.legal.un.org/ilc/ilcintro.htm#_ftnref2

Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States - Memorandum submitted by the Secretary-General, U.N. Doc. A/CN.4/2 (15 December 1948)

'Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the International Law Commission-Memorandum submitted by the Secretary-General', U.N. Doc. A/CN.4/1/Rev.1 (1949)

Report of the ILC on the work of its first session, U.N. Doc. A/CN.4/13 and Corr. 1-3 (12 April 1949)

'Outlines prepared by members of the Commission on Selected topics of international law', U.N. Doc. A/CN.4/454, in ILCYB, 1993, vol.II (Part One)

ILC Report on the work of its forty-sixth session (2 May-22 July 1994), 'Draft Code of Crimes against the Peace and Security of Mankind', U.N. Doc. A/49/10 (1994)

Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, in ILCYB, 2001, vol. II (Part Two)

ILC Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001) (2001)

ILC Report on the work of its fifty sixth session (3 May-4 June and 5 July-6 August 2004), 'The Obligation to Extradite or Prosecute ("aut dedere aut judicare") in International Law. Preliminary remarks (Zdzislaw Galicki)', U.N. Doc. A/59/10 (2004)

ILC Report on the work of its fifty-seventh session (2 May-3 June and 11 July-5 August 2005), U.N. Doc. A/60/10 (2005)

ILC Report on the work of its fifty-eighth session (1 May-9 June and 3 July-11 August 2006), U.N. Doc. A/61/10 (2006)

Preliminary report on the obligation to extradite or prosecute ("aut dedere aut judicare") by Mr. Zdzislaw Galicki, Special Rapporteur, U.N. Doc. A/CN.4/571 (7 June 2006)

Memorandum by the ILC Secretariat, 'Immunity of State officials from foreign criminal jurisdiction', U.N. Doc. A/CN.4/596 (31 March 2008)

'Preliminary report on immunity of State officials from foreign criminal jurisdiction'

(Anatolevich Kolodkin, Special Rapporteur), U.N. Doc. A/CN.4/601 (29 May 2008)

‘Third Report on the Obligation to Extradite or Prosecute (aut dedere aut judicare) by Zdzislaw Galicki, Special Rapporteur’, U.N. Doc. A/CN.4/603 (10 June 2008)

‘The obligation to extradite or prosecute (aut dedere aut judicare). Comments and information received from Governments’, U.N. Doc. A/CN.4/612 (26 March 2009)

ILC Secretariat, ‘Survey of Multilateral Conventions which may be of Relevance for the Commission’s Work on the Topic “The Obligation to Extradite or Prosecute (aut dedere aut judicare)”’, U.N. Doc. A/CN.4/630 (18 June 2010)

‘Bases for discussion in the Working Group on the topic “The obligation to extradite or prosecute (aut dedere aut judicare)”’. Paper prepared by Mr. Zdzislaw Galicki, Special Rapporteur’, U.N. Doc. A/CN.4/L.774 (24 June 2010)

ILC Report on the work of its sixty-third session (26 April–3 June and 4 July–12 August 2011), U.N. Doc. A/66/10 (2011).

ILC Report on the work of its sixty-fourth session (7 May to 1 June and 2 July to 3 August 2012), U.N. Doc. A/67/10 (2012)

‘Formation and evidence of customary international law. Note by Michael Wood, Special Rapporteur’, U.N. Doc. A/CN.4/653 (30 May 2012)

ILC Report on the work of its sixty-fifth session (6 May–7 June and 8 July–9 August 2013), ‘Report of the Working Group on the Obligation to Extradite or Prosecute (aut dedere aut judicare)’, U.N. Doc. A/68/10 (2013)

‘Second report on the immunity of State officials from foreign criminal jurisdiction. By Concepción Escobar Hernández, Special Rapporteur’, U.N. Doc. A/CN.4/661 (2013)

‘Report of the Working Group on the Obligation to extradite or prosecute (aut dedere aut judicare)’, U.N. Doc. A/CN.4/L.829 (22 July 2013)

ILC Report on the work of its sixty-sixth session (5 May to 6 June and 7 July to 8 August 2014), U.N. Doc. A/69/10 (2014)

‘Report of the Working Group on the Obligation to Extradite or Prosecute (aut dedere aut judicare)’, in ‘Second report on the immunity of State officials from foreign criminal jurisdiction. By Concepción Escobar Hernández, Special Rapporteur’, U.N. Doc. A/CN.4/661 (4 April 2013)

U.N. Office on Drugs and Crime:

‘Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols’, New York: United Nations (2003)

‘Universal Anti-Terrorism Conventions and Protocols’, New York: United Nations (2004)

‘Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments’, New York: United Nations (2006)

‘Legislative Guide to the Universal Legal Regime Against Terrorism’, New York: United Nations (2008)

‘Draft Model Legislative Provisions against Terrorism’ (2009), available online: www.un.org/en/sc/ctc/docs/bestpractices/undoc_modellegislation.doc

UNODC, ‘The use of the Internet for terrorist purposes’, 22 October 2012, available online: www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf

UNODC, Counter-Terrorism Database, available online: www.unodc.org/tldb/

UNODC, ‘(Draft) Guide for the Legislative Incorporation and Implementation of the Universal Instruments Against Terrorism’, available online: www.unodc.org/tldb/en/legislative_guides.html

‘The use of the Internet for terrorist purposes’ (22 October 2012), available online: www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf

Commission on Human Rights:

‘Summary prepared by the Secretary-General in accordance with Commission Resolution 18 (XXXIV) containing the comments received from Governments on the Draft Articles of the Convention on Torture, Commission on Human Rights, Thirty-Fifth Session, U.N. Doc. E/CN.4/1314 (1978)

Human Rights Council:

Alston, P., Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, ‘Study on targeted killings’, U.N. Doc. A/HRC/14/24/Add.6 (28 May 2010)

‘Report of the independent international commission of inquiry on the Syrian Arab Republic’, U.N. Doc. A/HRC/22/59 (5 February 2013)

‘Assault on medical care in Syria’, U.N. Doc. A/HRC/24/CRP.2 (13 September 2013)

Independent International Commission of Inquiry on the Syrian Arab Republic, Conference Room Paper: ‘Without a trace: enforced disappearances in Syria’ (19 December 2013)

Office of the U.N. High Commissioner for Human Rights:

Office of the U.N. High Commissioner for Human Rights, 'Report on the human rights situation in Ukraine', 17 August 2014

Council of Europe:

European Committee on Crime Problems, (1990), reprinted in (1991). 'Extraterritorial Criminal Jurisdiction'. 3 *Criminal Law Forum* 441

Recommendation No. R (97) 11 of the Committee of Ministers to Member States on the Amended Model Plan for the Classification of Documents Concerning State Practice in the Field of Public International Law, 12 June 1997, 'Part eight: jurisdiction of the state'

Parliamentary Assembly, 2014 Ordinary Session, Report, Twenty-fifth sitting (26 June 2014)

Council of Europe, 'The Committee of Experts on Terrorism (CODEXTER)', available online: www.coe.int/t/dlapil/codexter/overview_en.asp

Council of the European Union:

Joint Action 98/733/JHA of 21 December 1998, O.J. L 87 351 of 29 December 1998, p.1

Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, O.J. L 164 of 22 June 2002, p.3

Council Framework Decision 2008/919/JHA of 28 November 2008, amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330 of 9 December 2008, p.21

AU-EU Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction, Report, Council of the European Union Doc.8671/09 (16 April 2009), Annex

Commission of the European Communities:

Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, COM(2004)409 final of 08.06.2004

Commission Staff Working Paper, Annex to the Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, COM(2004)409 final of 08.06.2004, COM(2007) 0681 final

Report of the Secretary-General of the European Commission, Commission Staff Working Paper, Annex to the Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, SEC(2007)1

European Council:

‘Special meeting of the European Council (30 August 2014) – Conclusions’, EUCO 163/14, Brussels

African Union:

‘African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes’, African Union, Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, Addis Ababa, Ethiopia, EXP/MIN/Legal/VI Rev.1, available in African Union, Executive Council, Twenty-First Ordinary Session 9 – 13 July 2012, ‘The Report, the Legal Instruments and Recommendations of the Ministers of Justice/Attorneys General’, EX.CL/731(XXI), Annex EX.CL/731(XXI)c

NATO:

NATO, ‘Strengthening NATO-Gulf cooperation’, 20 October 2014, available online: www.nato.int/cps/en/natohq/opinions_113987.htm?selectedLocale=en

NATO, ‘Secretary General statement after the extraordinary meeting of the NATO-Ukraine Commission’, 29 August 2014, available online: www.nato.int/cps/en/natolive/news_112104.htm

International Criminal Court:

‘Report of the Bureau on the Review Conference – Addendum’, U.N. Doc. ICC-ASP/8/43/Add.1 (18-26 November 2009).

Documents on the 1949 Geneva Conventions:

Final Record of the Diplomatic Conference of Geneva of 1949, Federal Political Department, Berne, Vol. II

Pictet, J.S. (1952). ‘Commentary, I, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field’. Geneva: ICRC

Harvard Research:

Bingham, J.W. (Rapporteur) (1932). ‘Research in International Law IV: Piracy (Draft Convention Prepared for the Codification of International Law)’. 26 *AJIL (Supp.)* 743

General Introduction. Previous Work of the Research in International Law, 29 *AJIL (Supp.)* (1935) 1

Research in International Law Under the Auspices of the Faculty of the Harvard Law School, 'Jurisdiction with Respect to Crime', 29 *AJIL* (*Supp.*) (1935) 435

American Law Institute:

American Law Institute, Restatement (Second) of Foreign Relations Law of the United States, Washington, D.C. (1965)

American Law Institute, Restatement (Third) of Foreign Relations Law of the United States, Washington, D.C. (1987)

Institute of International Law:

'Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes', Christian Tomuschat (Rapporteur), Preparatory Work: Report - Replies and Observations of the Members of the Commission, 71 *Y.B. Inst. Int'l L.* 218 (2005)

Rapporteur C. Tomuschat, 'Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes', adopted in Krakow, 2005

Rapporteur Lady Fox, 'The Fundamental Rights of the Person and the Immunity from Jurisdiction in International Law', 73 *Annuaire de l'Institut de droit international* 1 (2009)

International Law Association:

Committee on Human Rights Law and Practice, 'Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences', 69th Conference of the International Law Association, 2000

American Society of International Law:

Speech by Harold Hongju Koh, Legal Adviser, U.S. Department of State, Annual Meeting of the American Society of International Law, Washington, D.C., 25 March 2010

International Bar Association:

International Bar Association Legal Practice Division, 'Report of the Task Force on Extraterritorial Jurisdiction' (28 September 2008)

Commonwealth:

Commonwealth Secretariat 'Model Legislative Provisions on Measures to Combat Terrorism' (September 2002), available online:
www.unodc.org/tldb/pdf/Commonwealth_modellaw_terr.pdf

Wainright, J., 'Some aspects of compliance with UN Security Council Resolution 1373', in *The Loophole - Journal of the Commonwealth Association of Legislative Counsel* (ed. by Berry, B.), Issue No. 1 of 2005, available online:
www.opc.gov.au/calc/docs/Loophole/Loophole_Mar05.pdf

Foreign Relations of the United States:

Report of Mr. Bayard, Secretary of State, to the President, case of Antonio Pelletier, 10 January 1887, *Foreign Relations of the United States*, 1887

United States Department of State:

Moore, J.B. (1887). 'Report on Extraterritorial Crime and the Cutting Case'. Washington: United States Department of State, Government Printing Office

British and Foreign Papers:

British and Foreign Papers, 1818-1819, Foreign Office, London

Law Commission:

Law Commission, 'Territorial and Extraterritorial Extent of the Criminal Law'. Working Paper No. 29 (1970)

Law Commission, Final Report, 'Report on the Territorial and Extraterritorial Extent of the Criminal Law', Paper No. 91 (1978)

Hansard:

HC, Home Affairs Committee - Seventeenth Report, Counter-terrorism, 30 April 2014

Mills, C., 'Military and Humanitarian Assistance to Iraq', Hansard, HC, SN06960, 1 September 2014

HC Debates, 'EU Council, Security and Middle East', Vol. 585, Col. 24, 1 September 2014

HC Debates, 'Iraq: Coalition Against ISIL', Vol. 585, Col. 1255, 26 September 2014

Treatises:

De Vattel, E., 'The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury' (ed. by Kapossy, B. & Whitmore, R. (Indianapolis: Liberty Fund, 2008))

Grotius, H., 'Commentary on the Law of Prize and Booty' (M.J. Van Ittersum (ed.) Indianapolis, Liberty Fund, 2006)

Hall, E.W., 'A Treatise on International Law' (ed. by Higgins, P.A. (Oxford: Clarendon, 1924))

Hyde, C.C. (1922). 'International Law'. Boston: Little

Moore, J.B. (1906). 'Digest of International Law', vol.II

Phillimore, R. (1854). 'Commentaries upon International Law'. Philadelphia: T. & J.W. Johnson, vol. I

Twiss, T. (1861). 'The Law of Nations Considered as Independent Political Communities. On the Right and Duties of Nations in Time of Peace'. Oxford: OUP

Westlake, J. (1894). 'Chapters on the Principles of International Law'. Cambridge: CUP

Westlake, J. (1910). 'International Law'. Cambridge: CUP

Wharton, F. (1885). 'A Treatise on Criminal Law'. Philadelphia: Kay & Brother

Wheaton, H. (1845). 'History of the Law of Nations in Europe and America; From the Earliest Times to Treaty of Washington, 1842'. New York: Gould, Banks & Co

Monographs:

Barker, J.C. (2006). 'The Protection of Diplomatic Personnel'. Aldershot: Ashgate

Becker, T. (2006). 'Terrorism and the State: Rethinking the Rules of State Responsibility'. Oxford: Hart

Boulbesba, A. (1999). 'The U.N. Convention on Torture and the Prospects for Enforcement'. The Hague: Martinus Nijhoff

Bowett, D.W. (1958). 'Self-Defence in International Law'. Manchester: MUP

Brierly, J.L., 'The Law of Nations: An Introduction to the International Law of Peace' (ed. by Waldock, H., Oxford: Clarendon Press, 1963)

Broomhall, B. (2003). 'International Justice and the International Criminal Court'. Oxford: OUP

- Cameron, I. (1994). 'The Protective Principle of International Criminal Jurisdiction'. Aldershot: Dartmouth
- Cameron, I. (2000). 'National Security and the European Convention on Human Rights'. London: Kluwer
- Cassese, A. (2005). 'International Law'. Oxford: OUP
- Colombos, C.J. (1967). 'The International Law of the Sea'. London: Longmans
- Crawford, J. (2002). 'The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries'. Cambridge: CUP
- Donnedieu de Vabres, HFA. (1928). 'Les principes modernes du droit pénal international'. Paris: Librairie du Recueil Sirey
- Higgins, R. (1994). 'Problems and Process: International Law and How We Use it'. Oxford: OUP
- Chehtman, A. (2010). 'The Philosophical Foundations of Extraterritorial Punishment'. Oxford: OUP
- Cownie, F. (2004). 'Legal Academics: Culture and Identities'. Oxford: Hart
- Ganor, B. 'Terrorism in the Post-Cold War Era', in Centre of Excellence Defence Against Terrorism, 2006, 'Global Terrorism and International Cooperation', Ankara: The Turkish General Staff Printing House
- Grewe, W.G., 'The Epochs of International Law' (trans. By Byers, M., Berlin: De Gruyter, 2000)
- Hoffman, B. (2006). 'Inside Terrorism'. Chichester: CUP
- Inazumi, M. (2005). 'Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law'. Belgium: Intersertia
- Lauterpacht, H. (1933). 'The Function of Law in the International Community'. Oxford: Clarendon Press
- Maogoto, J.N. (2005). 'Battling Terrorism. Legal Perspectives on the Use of Force and the War on Terror'. Aldershot: Ashgate
- McNair, A. (1956). 'International Law Opinions'. London: CUP
- Neumann, P. (2009). 'Old and New Terrorism'. Cambridge: Polity Press
- Posner, R.A. (2008). 'How Judges Think'. Harvard: HUP

Reydams, L. (2003). 'Universal Jurisdiction: International and Municipal Perspectives'. Oxford: OUP

Rodick, B.C. (1928). 'The Doctrine of Necessity in International Law'. New York: CUP

Rubin, A.P. (1997). 'Ethics and Authority in International Law'. Cambridge: CUP

Rubin, A.P. (1998). 'The Law of Piracy'. U.S.: Translational Publishers, Inc

Ryngaert, C. (2008). 'Jurisdiction in International Law'. Oxford: OUP

Saul, B. (2006). 'Defining Terrorism in International Law'. Oxford: OUP

Scott, J.B. (ed.) (1916). 'Resolutions of the Institute of International Law dealing with the Law of Nations'. New York: OUP

Textbooks:

Akande, D., "The Protective Principle"; "The Active Nationality Principle"; "The Passive Personality Principle"; "The Territoriality Principle", in Cassese, A. *et al.* (eds.) (2009). 'Oxford Companion to International Criminal Justice'. Oxford: OUP

Bantekas, I. & Nash, S. (2007). 'International Criminal Law'. Abingdon: Routledge-Cavendish

Bates, S.E. (2011). 'Terrorism and International Law. Accountability, Remedies, and Reform. A Report of the IBA Task Force on Terrorism'. Oxford: OUP

Blakesley, C.L., 'Jurisdictional Issues & Conflicts of Jurisdiction', in Bassiouni, M.C. (ed.) (1988). 'Legal Responses to International Terrorism: U.S. Procedural Aspects'. The Netherlands: Martinus Nijhoff

Blakesley, C.L., 'Extraterritorial Jurisdiction', in Bassiouni, M.C. (ed.) (2008). 'International Criminal Law, II, Multilateral and Bilateral Enforcement Mechanisms'. The Netherlands: Martinus Nijhoff

Boed, R. 'United States Legislative Approach to Extraterritorial Jurisdiction in Connection with Terrorism', in Bassiouni, M.C. (1999). 'International Criminal Law'. Ardsley: Transnational

Burgers, J.H. & Danelius, H. (1988). 'The United Nations Convention against Torture. A Textbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment'. The Netherlands: Martinus Nijhoff

Crawford, J. (2012). 'Brownlie's Principles of Public International Law'. Oxford: OUP.
Jennings, R. & Watts, A. (eds.) (1992). 'Oppenheim's International Law'. London: Longman

Cryer, R., 'Zardad', in Cassese, A. *et al.* (eds.) (2009). 'Oxford Companion to International Criminal Justice'. Oxford: OUP

Cryer, R. & Friman, H. & Robinson, D. & Wilmschurst, E. (2010). 'An Introduction to International Criminal Law and Procedure'. Cambridge: CUP

Cryer, R. & Harvey, T. & Sokhi-Bulley, B. & Bohm, A. (2011). 'Research Methodologies in EU and International Law'. Oxford: Hart

Grant, J.P. & Barker, J.C., 'The Harvard Research: Genesis to Exodus and Beyond', in Grant, J.P. & Barker, J.C. (eds.) (2007). 'Harvard Research in International Law: Contemporary Analysis and Appraisal'. Buffalo: William S. Hein & Co., Inc

Henckaerts, J. & Doswald-Beck, L. (eds.) (2005). 'Customary International Humanitarian Law'. Cambridge: CUP

Higgins, R., 'The general international law of terrorism', in Higgins, R. & Flory, M. (eds.) (1997). 'Terrorism and International Law'. London: Routledge

Kretzmer, D. 'Use of Lethal Force Against Suspected Terrorists', in Samuel, L.H.K. & White, D.N. & Salinas de Friás, M. A. (eds.) (2012). 'Counter-Terrorism International Law and Practice'. Oxford: OUP

Lowe, V. & Staker, C., 'Jurisdiction', in Evans, M.D. (2010). 'International Law'. Oxford: OUP

Macedo, S. (ed.) (2001). 'The Princeton Principles on Universal Jurisdiction'. Princeton: New Jersey

McCoubrey, H. & White, N.D. 'Textbook on Jurisprudence'. Blackstone: London

Murphy, J.F. 'Protected Persons and Diplomatic Facilities', in Murphy, J.F. & Evans, A.E. (eds.) (1978). 'Legal Aspects of International Terrorism'. D.C. Heath & Co.: Massachusetts

Murphy, J.F. (1985). 'Punishing International Terrorists'. USA: Rowan and Allanheld

Oppenheim, L. (1955). 'International Law' (ed. by Lauterpacht, H. London: Longmans, vol.I

Paust, J.J.. "'Nonprotected" Persons or Things', in Murphy, F.J. & Evans, E.A. (eds.) (1978). 'Legal Aspects of International Terrorism'. D.C. Heath & Co.: Massachusetts

Paust, J. J. 'International Law Concerning Domestic Prosecutions of Al Qaeda Attacks', in Heere, W.P. (ed.) (2004). 'From Government to Governance: The Growing Impact of Non-State Actors on the International and European Legal System'. The Hague: Asser Press

Pejic, J. 'Armed Conflict and Terrorism: There is a (Big) Difference', in Samuel, L.H.K. & White, D.N. & Salinas de Friás, M. A. (eds.) (2012). 'Counter-Terrorism

International Law and Practice'. Oxford: OUP

Pendleleton, M., 'Non-empirical Discovery in Legal Scholarship – Choosing, Researching and Writing a Traditional Scholarly Article', in McConville, M. & Hong Chui, W. (2007). 'Research Methods for Law'. Edinburgh: EUP

Röling, B.V.A., 'Aspects of the Criminal Responsibility for Violations of the Laws of War', in Cassese, A. (ed.) (1979). 'The New Humanitarian Law of Armed Conflict'. Naples: Editoriale Scientifica

Salter, M. & Mason, J. (2007). 'Writing Law Dissertations: An Introduction and Guide to Conduct of Legal Research'. Essex: Pearson

Sambei, A. & Plessis, A. & Polaine, M. (2009). 'Counter-Terrorism Law and Practice'. Oxford: OUP

Saul, B., 'Criminality and Terrorism', in De Friás, A.M.S. & Samuel, K.L.H. & White, N.D. (eds.) (2012). 'Counter-Terrorism International Law and Practice'. Oxford: OUP

Scharf, M.P., 'Jurisdiction with Respect to Crime: Universal Jurisdiction and the Harvard Research', in Grant, J.P. & Barker, J.C. (eds.) (2007). 'Harvard Research in International Law: Contemporary Analysis and Appraisal'. Buffalo: William S. Hein & Co., Inc

Schmid, A.P. (ed.) (2011). 'The Routledge Handbook of Terrorism Research'. Abingdon: Routledge

Shaw, M.N. (2008). 'International Law'. Cambridge: CUP

Simma, B. & Müller, A.T., 'Exercise and Limits of Jurisdiction', in Crawford, J. & Koskeniemi, M. (2012). 'The Cambridge Companion to International Law'. Cambridge: CUP

Smith, M.A., 'The Second Chechen War: Foreign Relations and Russian Counter-Reaction', in Aldis, A.C. (ed.) (2000). 'The Second Chechen War', Conflict Studies Research Centre, United Kingdom, Department of Defence

Stem, B., 'Better Interpretation and Enforcement of Universality Jurisdiction', in Joyner, C.C. (ed.) (1998). 'Reigning In Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17-21'. St. Agne: Érès

Treves, T., 'Piracy and the international law of the sea', in Guilfoyle, D. (ed.) (2013). 'Modern Piracy. Legal Challenges and Responses'. Cheltenham: Edward Elgar

White, N.D., 'The United Nations and Counter-Terrorism: Multilateral and Executive Law Making', in Samuel, L.H.K. & White, D.N. & Salinas de Friás, M. A. (eds.) (2012). 'Counter-Terrorism International Law and Practice'. Oxford: OUP

Journal Articles:

Abi-Saab, G. (2003). 'The Proper Role of Universal Jurisdiction'. 1 *JICJ* 596

Adler, S.J. (2006). 'Fighting Terrorism in a New Age: A Call for Extraterritorial Jurisdiction over Terrorists'. 18 *U.S.F. Maritime Law Journal* 164

Akehurst, M. (1972). 'Jurisdiction in International Law'. 46 *BYIL* 145

Andenas, M. & Weatherall, T. (2013). 'International Court of Justice: Questions Relating to the Obligations to Extradite or Prosecute (Belgium v Senegal) Judgment of 20 July 2012'. 62 *ICLQ* 753

Barker, J.C. (2007). 'The Politics of International Law-Making: Constructing Security in Response to Global Terrorism'. 3 *J. Int'l L. & Int'l Rel.* 5

Beale, J.H. (1923). 'The Jurisdiction of a Sovereign State'. 36 *Harv. L. Rev.* 241

Beckett, W.E. (1925). 'The Exercise of Criminal Jurisdiction over Foreigners'. 6 *BYIL* 49

Benoit, J.P. (2006). 'The Evolution of Universal Jurisdiction over War Crimes'. 53 *NLR* 259

Betti, S. (2006). 'The Duty to Bring Terrorists to Justice and Discretionary Prosecution'. 4 *JICJ* 1104

Blakesley, C.L. (1984). 'A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes'. 1984 *Utah Law Review* 685

Blakesley, C.L. (1987). 'Jurisdiction as Legal Protection Against Terrorism'. 19 *Conn. L. Rev.* 895

Blakesley, C.L. (1982). 'United States Jurisdiction over Extraterritorial Crime'. 73 *J. Crim. L. & Criminology* 1109

Boed, R. (2000). 'State of Necessity as a Justification for Internationally Wrongful Conduct'. 3 *Yale Human Rights and Development L. J.* 1

Boelaert-Suominen, S. (2000). 'Grave Breaches, Universal Jurisdiction and International Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for all Armed Conflicts?'. 5 *J. Conflict Security Law* 63

Bowett, D.W. (1982). 'Jurisdiction: Changing Patterns of Authority over Activities and Resources'. 53 *BYIL* 1

Boister, N. (2003). 'Transnational Criminal Law?'. 14 *EJIL* 953

Bradney, A. (1998). 'Law as a Parasitic Discipline'. 25 *Journal of Law and Society* 71

- Braniff, B. & Moghadam, A. (2012). 'Towards Global Jihadism: Al-Qaeda's Strategic, Ideological and Structural Adaptations since 9/11'. 5 *Perspectives on Terrorism* 36
- Brierly, J.L. (1924). 'The Shortcomings of International Law'. 5 *BYIL* 4
- Brierly, J.L. (1928). 'The "Lotus" Case'. 44 *LQR* 154
- Brierly, J.L. (1944). 'Vital Interests and the Law'. 21 *BYIL* 51
- Brown, P.M. (1923). 'The Marginal Sea'. 17 *AJIL* 89
- Brown, P.M. (1940). 'Protective Jurisdiction'. 34 *AJIL* 112
- Brown, P.M. (1940). 'Changing Concepts of International Law'. 34 *AJIL* 503
- Brown, P.M. (1953). 'Protective Jurisdiction over Marginal Waters'. 47 *AJIL* 452
- Brownlie, I. (1958). 'International Law and the Activities of Armed Bands'. 7 *ICLQ* 712
- Brownlie, I. (1961). 'The Use of Force in Self-Defence'. 37 *BYIL* 183
- Buffard, I. & Zemanek, K. (1998). 'The "Object and Purpose" of a Treaty: An Enigma?'. 3 *Austria Rev. Int'l & Eur. L.* 311
- Cassese, A. (2001). 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law'. 12 *EJIL* 993
- Cassese, A. (2003). 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction'. 1 *JICJ* 589
- Christakis, T. & Bannelier, K., 'French Military Intervention in Mali: Its' Legal but ... Why? Part I', 24 January 2013, EJIL: Talk!
- Colangelo, A.J. (2007). 'Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law'. 48 *Harv. Int'l L. J.* 121
- Colombos, J.C. (1923). 'Territorial Waters'. 9 *Problems of Peace and War* 89
- 'Consultative Meeting of Foreign Ministers of the American Republics', in 34 *AJIL* 1 (1940)
- D'Aspremont, J. (2010). 'Multilateral versus Unilateral Exercises of Universal Jurisdiction'. 43 *Isr. L. Rev.* 301
- Dickinson, D.M. (1926). 'Jurisdiction at the Maritime Frontier'. 40 *Harvard Law Review* 1
- Dyzenhaus, D. (2000). 'Positivism's Stagnant Research Programme'. 20 *OJLS* 703

- Forest, J.J.F. (2011). 'Al-Qaeda's Influence in Sub-Saharan Africa: Myths, Realities and Possibilities'. 5 *Perspectives on Terrorism* 63
- Garcia-Mora, M.R. (1958). 'Criminal Jurisdiction over Foreigners for Treason and Offences Against the State Committed upon Foreign Territory'. 19 *U. Pitt. L. Rev.* 567
- Gardner, J. (2001). 'Legal Positivism: 5 ½ Myths'. 46 *American Journal of Jurisprudence* 199
- Gardner, M. (2012). 'Piracy Prosecutions in National Courts'. 10 *JICJ* 797
- Garrod, M. (2012). 'The Development of Protective Principle Jurisdiction over War Crimes and the Hollow Concept of Universality'. 12 *ICLR* 763
- Garrod, M. (2014). 'Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law'. 25 *Diplomacy and Statecraft* 1
- Gathii, J.T. (2010). 'Kenya's Piracy Prosecutions'. 104 *AJIL* 416
- Gaynes, J.B. (1978). 'Bringing the Terrorist to Justice: A Domestic Law Approach'. 11 *Cornell Int'l L. J.* 71
- Grant, J.P. (2004). 'Beyond the Montreal Convention'. 36 *Case W.Res J.Int'l L.* 453
- Green, B.A. (1973-1974). 'Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons: An Analysis'. 14 *Va. J. Int'l. L.* 703
- Greenwood, C. (2002). 'International law and the war against terrorism'. 78 *International Affairs* 301
- Guillaume, G. (2004). 'Terrorism and International Law'. 54 *ICLQ* 537
- Hahn, M.J. (1990-1). 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception'. 12 *Mich. J. Int'l L.* 558
- Happold, M. (2003). 'Security Council Resolution 1373 and the Constitution of the United Nations'. 16 *LJIL* 593
- Hart, H.L.A. (1958). 'Positivism and the Separation of Law and Morals'. 71 *Harv. L. Rev.* 593
- Higgins, R. (1961). 'The Legal Limits to the Use of Force by Sovereign States United Nations Practice'. 37 *BYIL* 269
- Hixson, K. (1988). 'Extraterritorial Jurisdiction Under the Third Restatement of Foreign Relations Law of the United States'. 12 *Fordham Int'l L. J.* 127
- Hoffmann, B. (2002). 'Rethinking Terrorism and Counterterrorism Since 9/11'. 25

Studies in Conflict and Terrorism 303

Huang, Y. (2012). 'Universal jurisdiction over Piracy and East Asian Practice'. 11 *Chinese JIL* 623

Hutchinson, T.C. (2008). 'Developing legal research skills: expanding the paradigm'. 32 *Melbourne University Law Review* 1065

Hutchinson, T. & Duncan, N. (2012). 'Defining and Describing What We Do: Doctrinal Legal Research'. 17 *Deakin Law Review* 83

Jennings, R.Y. (1962). 'The Limits of State Jurisdiction'. 32 *Nordic Journal of International Law* 209

Jennings, R.Y. (1957). 'Extraterritorial Jurisdiction and the United States Antitrust Laws'. 33 *BYIL* 146

Jessup, P.C. (1937). 'The Anti-Smuggling Act of 1935'. 31 *AJIL* 101

Jinks, D. (2003). 'State Responsibility for the Acts of Private Armed Groups'. 4 *Chinese JIL* 83

Joyner, C.C. (1996). 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability'. 59 *Law and Contemporary Problems* 153

Kontorovich, E. (2004). 'Universal Jurisdiction and the Piracy Analogy'. 45 *Harvard Int'l L.J.* 183

Kontorovich, E. (2008). 'The Inefficiency of Universal Jurisdiction'. 1 *U. Ill. L. Rev.* 390

Koskeniemi, M. (2008). 'The Function of Law in the International Community: 75 Years After'. 79 *BYIL* 353

Kreß, C. (2006). 'Universal Jurisdiction over International Crimes and the *Institut de Droit International*'. 4 *JICJ* 561

Krizek, M.B. (1988). 'The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice'. 6 *B.U.Int'l L.J.* 337

Lauterpacht, H. (1928). 22 *AJIL* 105

Lauterpacht, H. (1931). 'The So-Called Anglo-American and Continental Schools of Thought in International Law'. 12 *BYIL* 31

Lauterpacht, H. (1947). 'Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens.' 9 *CLJ* 330

Lenhoff, A. (1964). 'International Law and Rules of International Jurisdiction'. 50

Cornell L.Q. 5

Leonard, E. (2010). 'The Lord's Resistance Army: an African Terrorist Group?'. 4 *Perspectives on Terrorism* 20

Lippman, M. (2002-2003). 'The New Terrorism and International Law'. 10 *Tulsa. J. Comp. & Int'l L.* 297

Masterson, W.E. (1927). 'National Jurisdiction in the Marginal Seas over Foreign Smuggling Vessels'. 13 *Problems of Peace and War* 53

Masterson, W.E. (1940). 'The Hemisphere Zone of Security and the Law'. 26 *A.B.A. J.* 860

Mann, F.A. (1964). 'The Doctrine of Jurisdiction in International Law'. 111 *Recueil des Cours* 1

McCarthy, G. J. (1989). 'The Passive Personality Principle and Its Use in Combating International Terrorism'. 13 *Fordham Int'l L. J.* 298

McCrudden, C. (2006). 'Legal research and social sciences'. 122 *LQR* 632

McGuinley, G. (1985). 'The Achille Lauro Affair – Implications for International Law'. 52 *Tennessee Law Review* 691

Meron, T. (1978). 'Non-Extradition of Israeli Nationals and Extraterritorial Jurisdiction: Reflections on Bill No. 1306'. 13 *Isr. L. Rev.* 215

Meron, T. (1995). 'International Criminalisation of Internal Atrocities'. 89 *AJIL* 554

Morris, M.H. (2001). 'Universal Jurisdiction in a Divided World: Conference Remarks'. 35 *New Eng. L. Rev.* 337

Murphy, S.D. (1999). 'Contemporary Practice of the United States'. 93 *AJIL* 161

Murphy, S.D. (ed.) (2000). 'Efforts to Obtain Custody of Osama Bin Laden'. 94 *AJIL* 366

Myers, D.P. (1926). 'Representation in the League of Nations Council'. 20 *AJIL* 689

Nagle, L.E. (2010)(a). 'Should Terrorism Be Subject to Universal Jurisdiction?'. 8 *Santa Clara J. Int'l L.* 87

Nagle, L.E. (2010)(b). 'Terrorism and Universal Jurisdiction: Opening Pandora's Box'. 27 *GSU L. Rev.* 339

Note (1973-1974). 'Extraterritorial Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law'. 72 *Mich. L. Rev.* 1087

O'Keefe, R. (2004). 'Universal Jurisdiction: Clarifying the Basic Concept'. 2 *JICJ* 735

- O'Keefe, R. (2009). 'The Grave Breaches Regime and Universal Jurisdiction'. 7 *JICJ* 811
- Paulus, A.J. & Simma, B. (1999). 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts – A Positivist View'. 93 *AJIL* 302
- Paust, J. J. (1982-1983). 'Federal Jurisdiction over Extraterritorial Acts of Terrorism and Non-immunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine'. 23 *Va. J. Int. L.* 191
- Peers, J. (2003). 'EU Responses to Terrorism'. 52 *ICLQ* 227
- Piazza, J. (2009). 'Islamist Terrorism More Dangerous?: An Empirical Study of Group Ideology, Organisation, and Global Structure'. 21 *Terrorism and Political Violence* 62
- Posner, R.A. (2001-2002). 'Legal Scholarship Today'. 115 *Harv. L. Rev.* 1314
- Preuss, L. (1944). 'American Conception of Jurisdiction with Respect to Conflicts of Law on Crime'. 30 *Problems of Peace and War* 184
- Randall, K. (1987-1988). 'Universal Jurisdiction'. 66 *Tex. L. Rev.* 785
- Ratner, S.R. & Slaughter, A.M. (eds.) (1999). 'Symposium on Method in International Law. Appraising the Methods of International Law: A Prospectus for Readers'. 93 *AJIL* 291
- Resolution by the International Prison Congress in Brussels in 1935, 29 *AJIL (Supp.)* (1935)
- Reuland, R.C.F. (1989). 'Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag State Jurisdiction'. 22 *Vand. J. Transnat'l. L.* 1161
- Rhode, D.L. (2001-2002). 'Legal Scholarship'. 115 *Harv. L. Rev.* 1327
- Robinson, D. (2011). 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse'. 9 *JICJ* 355
- Rogers, V.P.A. & McGoldrick, D. (2011). 'Assassination and Targeted Killing – The Killing of Osama Bin Laden'. 60 *ICLQ* 778
- Röling, B.V.A. (1960). 'The Law of War and the National Jurisdiction since 1945'. 100 *Recueil des Cours* 323
- Rosand, E. (2003). 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism'. 97 *AJIL* 333
- Rozakis, C.L. (1974). 'Terrorism and the Internationally Protected Persons in the Light of the ILC's Draft Articles'. 23 *ICLQ* 32

- Sageman, M. (2009). 'Confronting al-Qaeda: Understanding the Threat in Afghanistan'. 3 *Perspectives on Terrorism* 4
- Sarkar, L. (1962). 'The Proper Law of Crime in International Law'. 11 *ICLQ* 446
- Saul, B. (2005). 'Definition of "Terrorism" in the U.N. Security Council: 1985-2004'. 4 *Chinese JIL* 141
- Saul, B. (2006). 'The Legal Response of the League of Nations to Terrorism'. 4 *JICJ* 78
- Saul, B. (2011). 'Legislating from a Radical Hague: The UN Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism'. 24 *LJIL* 677
- Schmid, A.P. (2004). 'Frameworks for Conceptualising Terrorism'. 16 *Terrorism and Political Violence* 197
- Shcaor-Landau, C. (1980). 'Extra-Territorial Penal Jurisdiction and Extradition'. 29 *ICLQ* 274
- Scharf, M.P. (2000-2001). 'Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States'. 35 *New Eng. L. Rev.* 363
- Scharf, M.P. (2012). 'Universal Jurisdiction and the Crime of Aggression'. 53 *Harv Int'l L.J.* 357
- Scott, J.B. (1932). 'The Two Institutes of International Law'. 26 *AJIL* 87
- Singhal, A.K. & Malik, I. (2012). 'Doctrinal and socio-legal methods of research: merits and demerits'. 2 *Educational Research Journal* 252
- Szasz, P.C. (2002). 'The Security Council Starts Legislating'. 96 *AJIL* 901
- Talmon, S. (2005). 'The Security Council as World Legislature'. 99 *AJIL* 175
- Tams, C.J. (2009). 'The Use of Force against Terrorists'. 20 *EJIL* 359
- Tladi, D. & Taylor, G. (2011). 'On the Al Qaida/Taliban Sanctions Regime: Due Process and Sunsetting'. 10 *CILJ* 771
- Trapp, N.K. (2010). 'The Use of Force Against Terrorists: A Reply to Christian J. Tams'. 20 *EJIL* 1049
- Van Elst, R. (2000). 'Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions'. 13 *LJIL* 815
- Van Zwanenberg, A. (1961). 'Interference with Ships on the High Seas'. 10 *ICLQ* 785
- Vick, D. (2004). 'Interdisciplinarity and the Discipline of Law'. 31 *Journal of Law and Society* 163

- Villalpando, S. (2010). 'The Legal Dimensions of the International Community'. 21 *EJIL* 387
- Von Elbe, J. (1939). 'The Evolution of the Concept of Just War in International Law'. 33 *AJIL* 665
- Warbrick, C. & McGoldrick, D. & Katselli, E. & Shah, S. (2003). 'September 11 and the UK Response'. 52 *ICLQ* 245
- Ward, C.A. (2003). 'Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council'. 8 *J Conflict Security Law* 289
- Watson, G.R. (1993). 'The Passive Personality Principle'. 28 *Tex. Int'l L.J.* 1
- Weiler, J.H.H. & Paulus, A.J. (1997). 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?'. 8 *EJIL* 545
- Weinberg, L. & Pedahzur, A. & Hirsch-Hoefler, S. (2004). 'The Challenges of Conceptualizing Terrorism. 16 *Terrorism and Political Violence* 777
- Wilson, H.H. (1950). 'Some Principal Aspects of British Efforts to Crush the African Slave Trade, 1807-1829'. 44 *AJIL* 505
- Williams, S. (2012). 'Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions'. 75 *MLR* 368
- Wood, M.C. (1974). 'The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents'. 23 *ICLQ* 791
- Woolsey, H.L. (1926). 'Extraterritorial Crimes'. 20 *AJIL* 757
- Yee, S. (2011). 'Universal Jurisdiction: Concept, Logic, and Reality'. 10 *Chinese JIL* 503
- Yee, S. (2012). 'The Dynamic Interplay between the Interpreters of Security Council Resolutions'. 11 *CJIL* 613
- Yee, S. (2013). 'A Call for a More Rigorous Assessment of Universal Jurisdiction'. Annual Meeting of the American Society of International Law, April 2013)
- Zelman, J.D. (2001). 'Recent Developments in International Law: Anti-Terrorism Legislations – Part One: An Overview'. 11 *Transnat'l L. & Pol'y* 184

Research Papers:

Dorsey, J. & Paulussen, C., 'The Boundaries of the Battlefield: A Critical Look at the Legal Paradigms and Rules in Countering Terrorism', Research Paper, April 2013, International Centre for Counter-Terrorism, The Hague

Genn, H. & Partington, M. & Wheeler, S. (2006). 'Law in the Real World: Improving Our Understanding of How Law Works'. Nuffield Foundation, Final Report and Recommendations

Gestel, R.V. & Miclitz, H.W. (2011). 'Revitalising Doctrinal Legal Research in Europe: What About Methodology?'. European University Institute Working Papers, Law 2011/05

Ploch, L. (2010). 'Countering Terrorism in East Africa: The U.S. Response'. Congressional Research Service

Reydams, L. (2010). 'The Rise and Fall of Universal Jurisdiction', Leuven Centre for Global Governance Studies, Working Paper No. 37

Schuurman, B. & Eijkman, Q., 'Moving Terrorism Research Forward: The Crucial Role of Primary Sources', Background Note, June 2013, International Centre for Counter-Terrorism, The Hague

Wilkinson, P. (2005). 'International terrorism: the changing threat and the EU's response', Institute for Security Studies, Chaillot Paper No. 84

Lynch, A. 'The Tenacity of Bad Law: Why Anti-Terrorism Laws Proliferate and Persist'. Paper presented at Workshop 6 – The rule of law in an age of terrorism. VIIIth World Congress of International Association of Constitutional Law, Mexico, 6-10 December 2010

Online:

Amnesty International, 'Universal Jurisdiction: The duty to enact and implement legislation', 2001, London: Amnesty International Publications (AI Index: IOR 53/002-018/2001)

Amnesty International, 'International Law Commission: The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)', 2009, London: Amnesty International Publications (AI Index: IOR 40/001/2009)

Amnesty International, 'Universal Jurisdiction. A Preliminary Survey of Legislation Around the World', 2011, London: Amnesty International Publications (AI Index IOR 53/004/2011)

Burke, J., 'Al-Qaida leader announces formation of Indian branch', The Guardian, 4 September 2014, available online: www.theguardian.com/world/2014/sep/04/al-qaida-leader-announces-formation-indian-branch

Cameron, D. & Obama, B., 'We will not be cowed by barbaric killers', The Times, 4 September 2014, available online: www.thetimes.co.uk/tto/opinion/columnists/article4195915.ece

Dalsh, A.A., 'Saudi Arabia designates Muslim brotherhood terrorist group', Reuters, 7 March 2014, available online: www.reuters.com/article/2014/03/07/us-saudi-security-idUSBREA260SM20140307

Doyle, C., (2012). 'Extraterritorial Application of American Criminal Law, Congressional Research Service, available online: www.fas.org/sgp/crs/misc/94-166.pdf

Federal Bureau of Investigation, 'Ahmed Abu Khatallah Indicted for Terrorist Conspiracy Stemming from September 2012 Attack in Benghazi, Libya', 28 June 2014, available online:
www.fbi.gov/newyork/press-releases/2014/ahmed-abu-khatallah-indicted-for-terrorist-conspiracy-stemming-from-september-2012-attack-in-benghazi-libya

Gehr, W. (2002). 'The Universal Legal Framework Against Nuclear Terrorism', available online:
www.oecd-neo.org/law/nlb/nlb-79/005-015%20-%20Article%20W.%20Gehr.pdf

Gehr, W. (2006). 'The Universal Legal Framework Against Terrorism', available online:
www.unodc.org/tldb/bibliography/Biblio_LegalFramework_Gehr_2006.doc

Global Terrorism Database (GTD), maintained by the University of Maryland, available online: <http://www.start.umd.edu/gtd/>

International Commission of Jurists, 'Assessing Damage, Urging Action', Report of its Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, Geneva

Irish, J. & Chiki, L., 'French national taken in Algeria, group claims kidnapping', Reuters, 22 September 2014, available online: www.reuters.com/article/2014/09/22/us-algeria-france-kidnapping-idUSKCN0HH2FC20140922

Johnston, C., 'Isis militants release 49 hostages taken at Turkish consulate in Mosul', The Guardian, 20 September 2014, available online,
www.theguardian.com/world/2014/sep/20/isis-releases-hostages-turkish-consulate-mosul

Kiobel, at al. v Royal Dutch Petroleum, et al. in the Supreme Court of the United States, 'Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in support of neither party', 3 February 2012, available online:
www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/

Kiobel, at al. v Royal Dutch Petroleum, et al. in the Supreme Court of the United States, 'Brief of Amicus Curiae of the European Commission in Support of Neither Party', 13 June 2012, available online:
www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/

Kiobel, at al. v Royal Dutch Petroleum, et al., 'Supplemental Brief of Amici Curiae German Institute for Human Rights and International Law Experts in support of petitioners', 13 June 2012, available online:

www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/

Mapping Militant Organisations, Stanford University, available online:
www.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/61#attacks

Miller, H., 'The Caroline', The Avalon Project, available online:
www.avalon.law.yale.edu/19th_century/br-1842d.asp#intro.

National Commission on Terrorist Attacks Upon the U.S., (2004), available online:
www.govinfo.library.unt.edu/911/report/index.htm

Nice, G., 'The Permanent International Criminal Court and Africa', Gresham College Lecture, 31 October 2012, available online: www.gresham.ac.uk/lectures-and-events/the-permanent-international-criminal-court-%E2%80%93-the-icc-and-africa

RAND, Database of Worldwide Terrorism Incidents, A RAND National Defence Research Institute Research Project, available online:
www.rand.org/nsrd/projects/terrorism-incidents.html

'Report of the Accountability Review Boards, Bombings on the Embassy Bombings in Nairobi and Dar es Salaam on August 7, 1998', January 1999, available online: www.state.gov/regions/africa/accountability_report.html

Samuel, H.L.K. & White, N.D. & De Friás, S.M. (eds.) (2012). 'Report of Key Findings and Recommendations on the Rule of Law and Counter-Terrorism'. Multi-National Counter-Terrorism Expert Network, available online:
www.clubmadrid.org/en/publicacion/report_of_key_findings_and_recommendations_on_the_rule_of_law_and_counter_terrorism

Stephens, M., 'Islamic State: Where does jihadist group get its support?', BBC, 1 September 2014, available online: www.bbc.co.uk/news/world-middle-east-29004253

START Global Terrorism Database, available online: www.start.umd.edu/start/

Prince, R. (ed.), 'CIA says number of Islamic State fighters in Iraq and Syria has swelled to between 20,000 and 31,500', Telegraph, available online:
www.telegraph.co.uk/news/worldnews/northamerica/usa/11091190/CIA-says-number-of-Islamic-State-fighters-in-Iraq-and-Syria-has-swelled-to-between-20000-and-31500.html

The White House, Office of the Press Secretary, Statement by the President on ISIL, 10 September 2014, available online:
www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1

Transnational Terrorism, Security & the Rule of Law, 'Concepts of Terrorism: Analysis of the rise, decline, trends and risk', December 2008, available online:
www.transnationalterrorism.eu

U.S. Attorney's Office for the Southern District of New York, 'Swedish Citizen Oussama Kassir Found Guilty of Providing Material Support to Al-Qaeda', Press Release, 12 May 2009, available online:
www.justice.gov/usao/nys/pressreleases/index0509.html

Diplomatic Cables:

U.S. embassy (Islamabad), Cable, Osama bin Laden: Taliban spokesperson seeks new proposal for resolving bin Laden problem', 28 November 1998

U.S. embassy (Islamabad), Cable, 'Pakistan: Ambassador Raises bin Laden with Foreign Secretary Shamshad Ahmed', 6 October 1998

U.S. embassy (Islamabad), Cable, 'Usama bin Laden: Coordinating our Efforts and Sharpening our Message on bin Laden', 19 October 1998

Unpublished Theses:

Cryer, R. 'Towards an Integrated Regime for the Prosecution of International Crimes' (Unpublished Thesis, University of Nottingham, 2000)

Appendix A

The use of Protective Jurisdiction in National Laws

The purpose of this Appendix is to provide a full list of the categories of offences over which protective jurisdiction has been used in national laws. On the basis of a detailed analysis of the available data, the national laws of 160 States, out of a total of 181 of the available sample, have made provision, to varying degrees, for an exception to the territoriality of jurisdiction under the protective principle.¹ Only a small number of States, 21 in total, some of which regard acts of terrorism as posing a threat to their security and certain other of their vital interests, have not made provision in their national law for extraterritorial jurisdiction over the conduct of foreign nationals abroad.²

It will be recalled from chapter four that the purpose of systematising offences into categories, where they appear to be of a similar subject-matter, is to try and provide, as a preliminary matter, a more general overview and identify some of the more common themes and general trends in national laws relating to jurisdiction, in particular, the types of vital interests that have been included under the ambit of protective jurisdiction and around which a basic level of agreement appears to have clustered. In turn, it may be possible to propose the codification of protective jurisdiction based not on a narrow

¹ These States are listed in alphabetical order as follows: Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belgium, Belize, Bhutan, Bolivia, Bosnia Herzegovina, Botswana, Brazil, Bulgaria, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chile, China, Cook Islands, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Grenada, Greece, Guinea, Guyana, Hungary, Iceland, Indonesia, Iran, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kiribati, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxemburg, Madagascar, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritius, Mexico, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Palau, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Belarus, Republic of Korea, Republic of Macedonia, Republic of Moldova, Republic of Senegal, Republic of Serbia, Republic of South Africa, Republic of Suriname, Romania, Russia, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and The Grenadines, Samoa, San Marino, Saudi Arabia, Singapore, Slovakia, Slovenia, Solomon Islands, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syria, Tanzania, Tajikistan, Thailand, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, UAE, U.K., U.S., Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, Yemen and Zambia.

² These States are listed in alphabetical order as follows: Andorra, Benin, Brunei, Burkina Faso, Burundi, Chad, Democratic People's Republic of Korea, Dominica, Dominican Republic, East Timor, Eritrea, Guatemala, Guinea-Bissau, Kyrgyzstan, Lao People's Democratic Republic, Namibia, Niue, Papua New Guinea, Sao Tome and Principe, Somalia, Swaziland and Zimbabwe.

list of offences but, rather, based on a core category of shared vital State interests.³ It is important to bear in mind that the categorisation of offences in this way is not to suggest that the offences within a particular category are uniform and complementary, or even the same. On the contrary, the offences defined in national laws tend to be broad, and in some cases overly-vague, and contain different and divergent objective and subjective elements. This is particularly evident in respect of the different and divergent ways in which national laws define ‘terrorism’. The offences contained in these categories also contain offences dealing specifically with a specially defined offence of ‘terrorism’, as well as ordinary criminal offences that are not limited to acts of terrorism.

The categories of offences that follow are not listed in any particular hierarchical order:

1. Crimes committed against the State; the State’s sovereignty; impairing its territorial integrity or political independence; compelling the government to do or abstain from doing any act; undermining or overthrowing the State’s constitution. This includes threats, attempts and conspiracies.⁴
2. Crimes committed against the State’s governmental system; conspiracy or advocating the overthrow of government by force or violence.⁵
3. Crimes committed against the foundations of the State; endangering the State’s existence.⁶
4. Crimes and ‘terrorism’ (as defined by national laws) committed against the State’s fundamental social, political, constitutional or economic order.⁷
5. Crimes committed against the State’s internal or external security.⁸
6. Threats; assaults; use of force against the Head of State, public ministers, government or public officials and employees or agents.⁹

³ See chapters five and six.

⁴ Afghanistan, Albania, Angola, Antigua and Barbuda, Austria, Bahrain, Barbados, Belgium, Bolivia, Bosnia Herzegovina, Bulgaria, Canada, Cape Verde, China, Colombia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, Equatorial Guinea, Finland, Gabon, Gambia, Germany, Ghana, Grenada, Guyana, Hungary, Iceland, India, Indonesia, Ireland, Italy, Jamaica, Japan, Jordan, Kiribati, Latvia, Libya, Liechtenstein, Luxemburg, Malaysia, Maldives, Mauritius, Mexico, Mongolia, Montenegro, Myanmar, Netherlands, New Zealand, Norway, Oman, Pakistan, Palau, Peru, Poland, Portugal, Republic of Belarus, Republic of Macedonia, Republic of Serbia, Republic of South Africa, Romania, Rwanda, Saint Vincent and The Grenadines, San Marino, Singapore, Slovenia, Spain, Thailand, Turkey, Turkmenistan, U.S., Uzbekistan and Venezuela.

⁵ Israel, Maldives, Palau, Rwanda and U.S.

⁶ Czech Republic and Turkey.

⁷ Austria, Belarus, Belgium, Brazil, Colombia, Costa Rica, Cuba, Denmark, Egypt, Finland, Gambia, Germany, Iceland, Italy, Libya, Luxemburg, Mauritius, Netherlands, New Zealand, Republic of South Africa, Syria, Turkey and Uzbekistan.

⁸ Afghanistan, Angola, Armenia, Austria, Bahrain, Barbados, Belgium, Bolivia, Brazil, Bulgaria, Cameroon, Central African Republic, Colombia, Congo, Costa Rica, Côte d’Ivoire, Cyprus, Czech Republic, Bulgaria, Djibouti, Egypt, Equatorial Guinea, Fiji, France, Gabon, Gambia, Germany, Greece, Guinea, Guyana, India, Iran, Israel, Jordan, Libya, Madagascar, Malaysia, Mali, Malta, Montenegro, Morocco, Nepal, New Zealand, Nicaragua, Norway, Oman, Poland, Portugal, Republic of Belarus, Republic of Macedonia, Republic of Senegal, Republic of Serbia, Republic of South Africa, Romania, Russia, Singapore, Slovenia, Sri Lanka, Sudan, Switzerland, Thailand, Tonga, Turkey, Turkmenistan, U.S., Uruguay, Uzbekistan, Vanuatu, Venezuela and Yemen.

7. Crimes committed against internationally protected persons carrying out their official duties abroad, including diplomatic and consular personnel; their transportation, premises, embassies and missions located abroad; State and government property and institutions located abroad; and intergovernmental organisations located abroad. This includes threats, incitement, attempts and conspiracies.¹⁰
8. Insult or destruction of the State's flags or other symbols.¹¹
9. Insulting the nation.¹²
10. Insults against the President.¹³
11. Forgery, alteration or counterfeit of official documents, seals, marks, currency, bonds, stocks and securities.¹⁴
12. Crimes committed against the registered State's fixed platforms and off-shore installations.¹⁵
13. Crimes committed against or on board the registered State's vessels.¹⁶
14. Crimes committed on board or against, or the hijacking of, the registered State's civil aircraft.¹⁷
15. The use, production, construction, or otherwise acquiring, transferring, receiving, possessing, importing or exporting anti-aircraft missiles or their components. This includes threats to use such missiles.¹⁸

⁹ Angola, Austria, Armenia, Azerbaijan, Belgium, Bosnia Herzegovina, Bulgaria, Cape Verde, China, Colombia, Costa Rica, Egypt, Equatorial Guinea, Gambia, Greece, Indonesia, Ireland, Israel, Latvia, Malaysia, Mexico, Mongolia, Montenegro, Norway, Oman, Philippines, Poland, Portugal, Republic of Belarus, Republic of Macedonia, Republic of Serbia, Romania, Russia, Rwanda, Slovenia, Turkmenistan, U.K. and U.S.

¹⁰ Afghanistan, Armenia, Australia, Austria, Azerbaijan, Barbados, Bhutan, Bolivia, Cambodia, Canada, China, Cook Islands, Costa Rica, Croatia, Cuba, Djibouti, Egypt, France, Guyana, Indonesia, Ireland, Jamaica, Jordan, Kiribati, Libya, Liechtenstein, Malta, Mauritius, Monaco, Mongolia, New Zealand, Nepal, Netherlands, Nicaragua, Palau, Philippines, Poland, Republic of Belarus, Republic of South Africa, Romania, Russia, Rwanda, Saint Vincent and The Grenadines, Samoa, San Marino, Spain, Sri Lanka, Switzerland, Turkmenistan, U.K., U.S. and Uzbekistan.

¹¹ Angola, Bulgaria, Cape Verde, Germany, Latvia, Libya, Poland and San Marino.

¹² Libya, Poland, Slovenia and San Marino.

¹³ Germany, Oman and Poland.

¹⁴ Afghanistan, Albania, Austria, Azerbaijan, Bahrain, Belgium, Belize, Bosnia Herzegovina, Bulgaria, Cameroon, Cape Verde, Central African Republic, Colombia, Congo, Côte d'Ivoire, Cyprus, Djibouti, Ecuador, Egypt, El Salvador, France, Gabon, Germany, Greece, Guinea, Indonesia, Japan, Jordan, Latvia, Liberia, Libya, Luxemburg, Madagascar, Malaysia, Mali, Montenegro, Morocco, Netherlands, Nicaragua, Norway, Oman, Pakistan, Paraguay, Poland, Qatar, Republic of Macedonia, Republic of Senegal, Republic of Serbia, San Marino, Singapore, Slovenia, Spain, Switzerland, Tanzania, Thailand, Tonga, Turkey, U.K., U.S., Uruguay, Vanuatu and Yemen.

¹⁵ Afghanistan, Australia, Barbados, Cambodia, Canada, Cuba, El Salvador, France, Gambia, Guyana, Jamaica, Kiribati, Mauritius, Monaco, Niger, Norway, Palau, Republic of South Africa, Romania, Saint Vincent and The Grenadines and U.S.

¹⁶ Afghanistan, Albania, Australia, Bangladesh, Barbados, Belarus, Belgium, Bolivia, Cambodia, Canada, Cape Verde, Colombia, Costa Rica, Cuba, Djibouti, El Salvador, France, Gambia, Germany, Greece, Guyana, India, Indonesia, Jamaica, Japan, Kazakhstan, Kiribati, Latvia, Malawi, Mauritius, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Palau, Philippines, Republic of Macedonia, Republic of Serbia, Republic of South Africa, Romania, Russia, Saint Vincent and The Grenadines, Samoa, Singapore, Slovakia, Syria, Tonga, Trinidad and Tobago, Turkmenistan, U.S and Yemen.

¹⁷ Albania, Austria, Azerbaijan, Bahamas, Bangladesh, Barbados, Belgium, Bhutan, Bolivia, Botswana, Cambodia, Cape Verde, Colombia, Costa Rica, Croatia, Cuba, Czech Republic, Djibouti, El Salvador, Estonia, Fiji, France, Gambia, Germany, Greece, Guyana, Hungary, Iceland, India, Indonesia, Ireland, Japan, Kazakhstan, Korea, Latvia, Libya, Malawi, Malaysia, Malta, Mauritius, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Oman, Palau, Philippines, Republic of Macedonia, Republic of Serbia, Republic of South Africa, Russia, Saint Vincent and The Grenadines, Samoa, Singapore, Slovakia, Solomon Islands, Tanzania, Tonga, Tonga, Turkmenistan, U.K., U.S., Vanuatu, Viet Nam and Yemen.

16. The sabotage, damage or destruction (including by the use of explosives and bombs) of State or government buildings, property or premises; infrastructure facilities; information systems; installations; aircraft; and public transportation systems located inside and outside national territory. This category also includes offences committed against national defences, such as defensive sea areas and military weapons, facilities, equipment, installations, utilities, premises, vessels and aircraft located inside and outside national territory. It also includes the bombing of public places and against public or privately owned facilities, including water, energy, fuel and interstate and foreign communications systems. This includes attempts and conspiracies.¹⁹
17. Crimes committed against the State's Armed Forces during peace.²⁰
18. The illicit manufacture, traffic, importation or supply of military weapons, unmarked plastic explosives; nuclear and radioactive materials; dangerous waste; chemical and biological weapons; contagious disease pathogens; and weapons of mass destruction, to be used, or threatened to be used, against the State or the State's interests.²¹
19. The unlawful obtaining, use or threat to use nuclear materials in order to threaten or compel the government or an international organisation to do or refrain from doing any act; against government property located within or outside the country; or against the State's citizens and corporations within or outside the country. This also includes attempts and conspiracies.²²
20. Crimes and 'terrorism' (as defined by national law), including by the use of bombs and weapons of mass destruction, committed in order to kill, injure, intimidate or compel the State's nationals or a section of society inside or outside the territory of the State. This also includes threats and incitement, attempts and conspiracies against the State's nationals.²³

¹⁸ U.S.

¹⁹ Angola, Antigua and Barbuda, Bahrain, Barbados, Bolivia, Bulgaria, Cambodia, Canada, Cape Verde, Costa Rica, Cuba, Cyprus, Czech Republic, Egypt, Gambia, Germany, Ghana, Guyana, Indonesia, Israel, Jamaica, Jordan, Kiribati, Korea, Lesotho, Libya, Liechtenstein, Malta, Marshall Islands, Mauritius, Monaco, Mongolia, Montenegro, New Zealand, Oman, Palau, Republic of Belarus, Republic of Serbia, Republic of South Africa, Rwanda, Samoa, Singapore, Sri Lanka, Sudan, Switzerland, Syria, Thailand, Turkmenistan, U.K., U.S. and Uzbekistan.

²⁰ Angola, Austria, Bahrain, Poland, Switzerland and U.S.

²¹ Afghanistan, Albania, Algeria, Austria, Azerbaijan, Bahrain, Bangladesh, Canada, Cambodia, Cape Verde, Chile, China, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ethiopia, France, Gambia, Germany, Guyana, Indonesia, Ireland, Kiribati, Korea, Libya, Madagascar, Malaysia, Mauritius, Montenegro, Mozambique, Nepal, Niger, Nigeria, Norway, Palau, Philippines, Poland, Portugal, Qatar, Republic of Belarus, Republic of Serbia, Republic of South Africa, Russia, Saint Kitts and Nevis, Saint Vincent and The Grenadines, Spain, Sri Lanka, Sudan, Switzerland, Tajikistan, Thailand, U.S. and Uzbekistan.

²² Afghanistan, Australia, Barbados, Cambodia, Canada, Croatia, France, Germany, Guyana, Indonesia, Jamaica, Kiribati, Malta, Mauritius, Monaco, Montenegro, New Zealand, Niger, Norway, Palau, Republic of Serbia, Rwanda, Slovenia, Switzerland and U.S.

²³ Afghanistan, Albania, Angola, Antigua and Barbuda, Armenia, Austria, Azerbaijan, Bahrain, Barbados, Belgium, Bolivia, Bosnia Herzegovina, Bulgaria, Canada, China, Czech Republic, Denmark, Djibouti, Finland, France, Gambia, Germany, Ghana, Grenada, Greece, Guyana, Hungary, Indonesia, Ireland, Israel, Jamaica, Japan, Jordan, Kiribati, Korea, Latvia, Lesotho, Liechtenstein, Luxemburg, Madagascar, Mauritius, Monaco, Montenegro, Nepal, Netherlands, New Zealand, Oman, Peru, Philippines, Republic of Belarus, Republic of Korea, Republic of Macedonia, Republic of Serbia, Republic of South Africa, Romania, Russia, Rwanda, Saint Kitts and Nevis, Saint Vincent and The Grenadines, San Marino, Slovenia, Sri Lanka, Switzerland, Syria, Tajikistan, Thailand, Tunisia, Turkmenistan, U.K., U.S., Uruguay, Uzbekistan, Venezuela and Zambia.

21. Acts against the State by terrorist groups, armed bands, subversive associations, military and paramilitary groups and criminal organisations (as defined by national law), which transcend national boundaries. This includes membership, organising, participating, facilitating, instructing, support, recruitment, directing and leadership of such groups and their activities. It also includes threats, incitement, attempts and conspiracies.²⁴
22. Receiving military training from a foreign terrorist organisation.²⁵
23. Incitement of terrorist acts (as defined by municipal law); encouragement or facilitation of the State's nationals to take part in terrorist activities or armed conflict abroad.²⁶
24. Collecting or providing funds or other forms of direct or indirect support to terrorist and armed groups abroad in order to commit crimes against the State or an international organisation.²⁷
25. Terrorist acts or other crimes committed in order to compel international organisations and institutions to do or abstain from doing any act or damaging their economic and other fundamental structures. This includes, for example, the International Red Cross and entities of the United Nations, including military, peace building, peacekeeping, humanitarian and other missions.²⁸
26. Terrorist acts committed abroad against an entity or institution of the European Union that is based in the territory of the prosecuting State.²⁹
27. 'Terrorism' committed on the high seas.³⁰
28. Terrorist activity abroad to cause a public emergency or resurrection within the State.³¹
29. Threats or violence committed at the direction or benefit of a foreign terrorist group that induces or attempts to induce any person to harm the State 'interests'.³²
30. Harboursing terrorists.³³

²⁴ Afghanistan, Angola, Antigua and Barbuda, Armenia, Austria, Azerbaijan, Bahrain, Belgium, Bhutan, Bolivia, Bulgaria, Cambodia, Canada, Cape Verde, Chile, China, Costa Rica, Cuba, Cyprus, Czech Republic, El Salvador, Ethiopia, France, Georgia, Germany, Ghana, Greece, Guyana, Hungary, India, Indonesia, Iran, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kiribati, Korea, Latvia, Libya, Lebanon, Liechtenstein, Lithuania, Luxemburg, Malaysia, Malta, Mauritius, Monaco, Mongolia, Montenegro, Nepal, Norway, Oman, Pakistan, Palau, Philippines, Peru, Poland, Portugal, Qatar, Republic of Belarus, Republic of Macedonia, Republic of Serbia, Republic of South Africa, Romania, Russia, Rwanda, Saint Vincent and The Grenadines, San Marino, Slovenia, Spain, Sudan, Switzerland, Tajikistan, Tanzania, Thailand, Turkey, Turkmenistan, U.K., U.S., Uzbekistan, Vanuatu, Venezuela and Yemen.

²⁵ U.S.

²⁶ Barbados, Canada, China, Indonesia, Israel, Italy, Jordan, San Marino, Sri Lanka, U.K. and U.S.

²⁷ Afghanistan, Antigua and Barbuda, Austria, Azerbaijan, Bahrain, Barbados, Belgium, Belize, Bulgaria, Cambodia, Canada, China, Cuba, Cyprus, Denmark, France, Ghana, Guyana, Indonesia, Ireland, Israel, Italy, Jamaica, Jordan, Kiribati, Korea, Lebanon, Libya, Liechtenstein, Luxemburg, Malaysia, Malta, Mauritius, Monaco, Nepal, Netherlands, New Zealand, Niger, Norway, Palau, Peru, Philippines, Portugal, Qatar, Republic of South Africa, Russia, Rwanda, Saint Kitts and Nevis, Saint Vincent and The Grenadines, Samoa, San Marino, Singapore, Slovenia, Spain, Sri Lanka, Switzerland, Syria, Tajikistan, Tanzania, U.K., U.S., Uzbekistan and Venezuela.

²⁸ Afghanistan, Austria, Azerbaijan, Barbados, Belgium, Bulgaria, Denmark, Finland, Gambia, Germany, Grenada, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Jamaica, Kiribati, Liechtenstein, Luxemburg, Malta, Mauritius, Monaco, New Zealand, Poland, Republic of South Africa, San Marino, Singapore, Thailand, Tonga, U.S. and Uzbekistan.

²⁹ Austria, Belgium, Ireland, Netherlands and U.K.

³⁰ U.S.

³¹ South Africa.

³² Canada.

³³ U.S.

31. Cyber crime; cyber 'terrorism' in order to interfere, intercept or damage information systems; essential infrastructure; government computers; and national security.³⁴
32. Hostage-taking in order to compel a government or an intergovernmental organisation or an international organisation to do or abstain from doing any act.³⁵
33. Broadcasting or publication of propaganda with a view to threatening public security.³⁶
34. Publication or communication of news relating to national defences and security where this has been prohibited or of false news likely to infringe national security.³⁷
35. Flying over national territory without agreement or diplomatic permission.³⁸
36. Crimes committed against State secrets or intelligence concerning security, defence, military and economic interests, including the communication of such information to a foreign government or organisation or terrorist group.³⁹
37. Espionage.⁴⁰
38. Economic/commercial espionage in favour of another person, organisation or State, to the detriment of national economic, security and defence interests.⁴¹
39. Harm to the State's financial system or status or economy.⁴²
40. Crimes committed against the State or defrauding the State. This includes conspiracies.⁴³
41. Bribery, or promises or offers thereof, of public officials by a foreigner to engage in certain acts, including 'terrorism'.⁴⁴
42. Treason; high treason by residents or foreign nationals employed by the State.⁴⁵
43. Crimes committed against the State's 'interests'.⁴⁶
44. Damage to national resources.⁴⁷
45. Serious damage to the environment.⁴⁸
46. Traffic of illicit drugs.⁴⁹

³⁴ Cuba, El Salvador, France, Germany, Malaysia, U.K. and U.S.

³⁵ Australia, Austria, Azerbaijan, Bahamas, Bangladesh, Belgium, Bulgaria, Cambodia, Canada, Cape Verde, Cook Islands, Croatia, Cuba, Czech Republic, El Salvador, Estonia, Georgia, Guyana, Ireland, Jamaica, Japan, Kazakhstan, Kiribati, Korea, Liechtenstein, Malaysia, Malta, Mauritius, Monaco, Nepal, New Zealand, Niger, Oman, Palau, Philippines, Poland, Republic of Belarus, Republic of Macedonia, Republic of South Africa, Russia, Rwanda, Saint Vincent and The Grenadines, Samoa, Singapore, Slovenia, Sri Lanka, Switzerland, Turkmenistan, Ukraine, U.K., U.S., Uzbekistan, Viet Nam and Yemen.

³⁶ Egypt, Libya, Myanmar, Republic of Macedonia and Switzerland.

³⁷ Cyprus, Norway and Romania.

³⁸ Gabon and Republic of Senegal.

³⁹ Belgium, Canada, Cape Verde, Gabon, Germany, Israel, Latvia, Montenegro, Norway, Republic of Macedonia, Republic of Senegal, Republic of Serbia, Romania, San Marino, Tanzania.

⁴⁰ Angola, Belgium, Bulgaria, Cyprus, El Salvador, Gabon, Hungary, Mongolia, Montenegro, Poland, Norway, Oman, Republic of Macedonia, Republic of Senegal, Republic of Serbia, San Marino, Slovenia and Tanzania.

⁴¹ Afghanistan, Austria, Bolivia, Canada, Germany, Montenegro and Switzerland.

⁴² Gabon, Israel, Latvia, Oman and Jamaica.

⁴³ Marshall Islands, Republic of South Africa and U.S.

⁴⁴ Kiribati, Libya and U.K.

⁴⁵ Angola, Austria, Belgium, Bulgaria, Cyprus, Germany, Japan, Oman, Republic of Macedonia, Republic of Senegal and Romania.

⁴⁶ Afghanistan, Albania, Armenia, Belarus, Bulgaria, Egypt, Jordan, Kazakhstan, Nicaragua, Norway, Republic of Korea, Latvia, Romania, Russia, Slovenia, Tajikistan and Tunisia.

⁴⁷ Bolivia.

⁴⁸ Austria, Belarus, France and Philippines.

⁴⁹ Albania, Austria, Azerbaijan, Bolivia, Costa Rica, Cyprus, Czech Republic, Germany and Peru.

47. Illicit traffic of persons.⁵⁰
48. Genocide.⁵¹
49. Crimes against humanity.⁵²
50. Crimes committed against the property or functioning of any designated national association or body.⁵³
51. Crimes and hostile acts committed in order to expose the State to the danger of war or a breakdown of its relations with a foreign power.⁵⁴
52. Attempt or conspiracy to undertake mercenary activities, or any person recruiting, equipping, funding or training mercenaries, against the State.⁵⁵
53. Taking up of arms; waging war; aggression and preparation for aggression, inciting aggression, attempting, assisting or facilitating a foreign State to commit aggression.⁵⁶
54. Recruitment of the State's nationals or residents for service in foreign armed forces, military organisations or mercenary military service during armed conflict against the State.⁵⁷
55. Subduing national defence facilities and installations and military weaponry belonging to a State's armed forces during war.⁵⁸
56. Interfering with the operation of the States military forces during war.⁵⁹
57. Offering assistance to the enemy for the purpose of weakening the military force of the State in time of war.⁶⁰
58. Infiltrating by disguise the State's national and military defences.⁶¹
59. Taking pictures or drawings of military or naval defences where this has been prohibited.⁶²
60. Maintaining correspondence with a hostile power; being at the disposal of a foreign army without government authorisation and where it may harm national security, during war or in time of peace.⁶³
61. Crimes committed against the State or the State's nationals in time of war, including those persons not directly involved in armed conflict in order to intimidate the population or compel the government.⁶⁴
62. War crimes.⁶⁵

⁵⁰ Austria and Kiribati.

⁵¹ Belarus.

⁵² Azerbaijan and Cuba.

⁵³ Israel.

⁵⁴ Armenia, Belgium, Bulgaria, Cuba, Ecuador, Gabon, Israel, Japan, Libya, Norway, Panama, Republic of Belarus, Republic of Senegal, Romania and Uzbekistan.

⁵⁵ Angola and Cape Verde.

⁵⁶ Angola, Belgium, Bulgaria, Cape Verde, Gabon, Germany, Hungary, Indonesia, Latvia, Libya, Malaysia, Montenegro, Myanmar, Norway, Oman, Poland, Republic of Korea, Republic of Macedonia, San Marino, Singapore and Slovenia.

⁵⁷ Cape Verde, Gabon, Libya, Poland and Republic of Macedonia.

⁵⁸ Norway and Romania.

⁵⁹ U.S.

⁶⁰ Hungary.

⁶¹ Republic of Senegal.

⁶² Gabon, Germany and Republic of Senegal.

⁶³ Gabon, Republic of Senegal, Tunisia.

⁶⁴ Bahrain, Barbados, China, Egypt, Luxemburg, Monaco and Norway.

⁶⁵ Belarus, Switzerland and U.S.

